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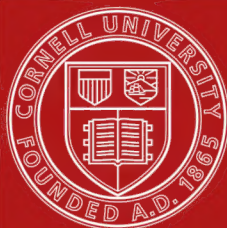
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A SELECTION OF CASES

ON THE

LAW OF

EXTRAORDINARY LEGAL

REMEDIES

INCLUDING

MANDAMUS, QUO WARRANTO, PROHIBITION,
CERTIORARI, PROCEDENDO AND
HABEAS CORPUS

WITH COLLATERAL NOTES AND CITATIONS

ASCO
APR 13
BY
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BY

V. H. ROBERTS

TO THE MEMORY OF MY MOTHER.

PREFACE

THAT the subject of Extraordinary Legal Remedies is one of great practical importance will not, I think, be denied. When, however, the instructor has attempted to arrange a course of study in this subject, he has invariably been confronted with the serious difficulty of being unable to place in the hands of the student either a text-book suitable for class-room work or an adequate collection of cases covering the subject. Where the instructor desired to use the case-method in teaching the subject, no other course was open than to send the class to the library, and the results of this method of obtaining the necessary material were anything but satisfactory to either instructor or student. This volume of cases is the result of a number of years' experience with the problem I have indicated.

In making the selection of cases herein, I have in no measure been guided or influenced in my choice by the adjudications of any particular state or jurisdiction. I have had before me only the single purpose of arranging and classifying the subject and selecting the cases in order to afford material from whose study and investigation the student may be able to gain an accurate and working knowledge of the principles underlying and governing the law of Extraordinary Legal Remedies.

In the notes, which will be found copiously scattered throughout the volume, I have attempted to indicate the state of the law in other jurisdictions on the point involved, and in many instances have utilized the notes for a brief statement of collateral principles which the necessity of keeping within the space of a single volume forbade bringing into the text. The cases cited in the notes have been carefully verified, and, I trust, will all be found in point.

In almost every case, portions of the opinion, either cumulative or not touching the point involved, have been omitted and in many

cases the statement of facts has been much abridged and sometimes wholly rewritten. I have not endeavored to indicate this fact in every case by the conventional footnote, but leave the above statement to serve as a general explanation applicable to all cases. For obvious reasons, I have devoted comparatively little space to the matter of Pleading and Practice in its relation to the subject of the work.

In the following pages I have not attempted to make any contribution to legal literature; I have only sought to present a subject, which I deem very important and of practical value, in a form which will enable it, I hope, to be readily taught and handled with some degree of satisfaction in the class-room. While this volume is in no sense arranged with the needs of the practitioner in view, I venture to hope that the student may, after adding his notes and the results of his own research, find the volume of some real use in the future practice of his profession.

In conclusion, I submit this work to the kindly judgment of those who may have occasion to use it, in the sincere hope that it may prove of service, if in nothing more than to lighten the labor of both instructor and student.

V. H. ROBERTS.

COLUMBIA, Mo.,

September 15, 1905.

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EXTRAORDINARY LEGAL REMEDIES.

CHAPTER I.

MANDAMUS.

Section 1.—In General.

1. Definition.

"A WRIT of mandamus is, in general, a command issuing in the King's name from the Court of King's Bench, and directed to any person, corporation or inferior court of judicature within the King's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the Court of King's Bench has previously determined, or at least supposes, to be consonant to right and justice." III Blackstone Comm. 110.

"A command issuing from a common law court of competent jurisdiction, in the name of the state or sovereign, directed to some corporation, officer or inferior court, requiring the performance of some particular duty therein specified, which duty results from the official station of the party to whom the writ is directed, or from operation of law." High, Ex. Legal Remedies, §1.

REX v. BARKER.

1762. COURT OF KING'S BENCH. 3 Burrows, 1265.

APPLICATION for writ of mandamus to be directed to certain trustees of a Presbyterian meeting-house, requiring them to admit Christopher Mends as minister, he being duly elected to such office.

LORD MANSFIELD (quoting from *Rex v. Blooer*, 2 Burr. (K. B.) 1043)—Where there is a right to execute an office, perform a

service or exercise a franchise (more especially if it be a matter of public concern, or attended with profit), and a person is kept out of possession or dispossessed of such right and has no other specific legal remedy, this court ought to assist by mandamus; upon reasons of justice and of public policy, to preserve peace, order and good government.

A mandamus is a prerogative writ; to the aid of which the subject is entitled, upon a proper case previously shewn, to the satisfaction of the court. The original nature of the writ, and the end for which it was framed, direct upon what occasions it should be used. It was introduced to prevent disorder from a failure of justice and a defect of police. Therefore it ought to be used on all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one.

In *State v. Bruce*, 3 Brev. (S. Car.) 264, Mandamus is defined as "a criminal process relating to a civil right." See also *Dunklin Co. v. County Ct.*, 23 Mo. 449; *Tawas, etc. R. Co. v. Judge*, 44 Mich. 479; *Legg v. Mayor*, 42 Md. 203; *Weston v. Charleston*, 2 Pet. (U. S.) 449; *Holmes v. Jennison*, 14 Pet. (U. S.) 540.

2. Prerogative writ or writ of right.

See *Commonwealth of Kentucky v. Wm. Dennison, Governor of Ohio*, 24 How. (U. S.) 66.

GILMAN ET AL. V. BASSETT ET AL.

1866. SUPREME COURT OF ERRORS OF CONNECTICUT. 33 Conn. 298.

BUTLER, J.—This is an application by a special committee of the south school district of Hartford, asking on behalf of said district a peremptory mandamus to compel the stated district committee to carry into effect a vote of the district directing that committee to reinstate a teacher whom they had removed from the charge of a particular school. The superior court on request of the applicants issued an alternative mandamus, requiring the stated committee to comply with the vote of the district or show reason why a peremptory mandamus should not issue, and that committee still refusing to comply, appeared in court and set forth their reasons in a return. The facts so set up were traversed, and on a hearing the court found the facts, and reserved the questions arising thereon for our advice. The argument has taken an extended range, but the case

turns on the question whether it was competent for the district to direct the act to be done, and the consequent duty of the committee to do it.

Had then the district a legal right to pass the vote, and if so, could the committee lawfully refuse to obey it?

There can be no question in respect to the power of the district to pass the vote. The law constituted the district a corporation and imposed upon it the duty of establishing and maintaining the necessary schools within its limits. For that purpose all the necessary power is given. The district is required and expected to elect annually a district committee. If they neglect to do so, the board of visitors are authorized to appoint them, and if the district neglect to provide a teacher and rooms the committee are authorized to provide them, that a school may be kept and the education of the children secured. But such authority is given to the committee contingently, to be exercised only in the event that the district fail to exercise their power or do their duty. When the district act, either in respect to teachers or rooms, their action is exclusive, and the committee are powerless. They cannot override the action of the district; and if that action is conformable to law, they should obey or resign, or show some legal excuse for their disobedience. If they fail to show such excuse, it is the duty of the court upon application to compel them to obey by mandamus.

In this case the committee come into court and allege several excuses.

In the first place, they allege that the writ of mandamus is a prerogative writ, and that the court cannot issue it except to prevent disorder from a failure of justice and a defect of police; and that it regularly issues only in cases relating to the public and the government, and where in justice and good government there ought to be one. *Doubtless the writ was originally a prerogative one, but it has ceased to depend upon any prerogative power, and is now regarded in much the same light as ordinary process.* And admitting the other propositions to be true, the case falls within them. Education in this state is a matter of public governmental concern, and has been such from its organization. This school district was created as a *public* territorial corporation, and the duty of providing for the education of the children within its limits is imposed upon it by public statute law. And the committee were elected and their duties prescribed by force and direction of the same law. It is a clear case, therefore, for a mandamus, and a case where that is the only legal and specific remedy.

The superior court must be advised to issue a peremptory mandamus.

In accord: *Kendall v. United States*, 12 Pet. (U. S.) 527; *Arberry v. Beavers*, 6 Tex. 457; *State v. Com. of Jefferson Co.*, 11 Kan. 66; *Haymore v. Com. of Yadkin*, 85 N. Car. 268.

Contra: *School Inspectors, etc., v. People*, 20 Ill. 525; *People v. Hatch*, 33 Ill. 134; *Ottawa v. People*, 48 Ill. 240. Under the Illinois statutes it is now held that the remedy is an ordinary civil action. *People v. Weber*, 86 Ill. 283; *Illinois, etc., R. Co. v. People*, 143 Ill. 434.

In New York the courts seem inclined to treat the writ as a prerogative one. *People v. Board of Police*, 26 N. Y. 316.

See also *County of Calveras v. Brockway*, 30 Cal. 325; *O. & V. R. Co. v. Plumas Co.*, 37 Cal. 354; *Moody v. Fleming*, 4 Ga. 115.

3. Regarded generally as an ordinary action at law.

AMERICAN WATERWORKS CO. V. STATE EX REL.

1891. SUPREME COURT OF NEBRASKA. 31 Neb. 445, 48 N. W. 64.

NORVAL, J.—The defendants in error filed a petition in the district court of Douglass county against the plaintiff in error, praying that a peremptory writ of mandamus may issue to compel it to furnish and supply water on the premises of the defendants in error, at 1202 and 1206 Cass Street, in the City of Omaha. On the 18th day of September, 1889, application was made for said writ to Hon. Eleazer Wakely, one of the judges of said court, at chambers. Thereupon said judge ordered that the plaintiff in error show cause on Saturday following why said writ should not be granted. At the time named the plaintiff in error filed its answer, submitting the facts embodied in the affidavits of George Zeigler and Nelson M. Howard, attached to the answer, as a reason why the writ should not issue. On the 23d day of September, 1889, the application was heard before said judge at chambers. On the hearing the defendants in error read in support of their application the affidavits of J. J. O'Connor, John Burns, David Mahoney, John Mosset, Vincent Kenney, C. C. Field, John Drummond, Belle Craycroft, Mrs. John Mosset, Else Mark, H. A. Mosset, and James Johnson. The plaintiff in error objected at the time to the reading and consideration of said affidavits, which objection was overruled. The affidavits were read and considered, and the plaintiff in error duly excepted. The judge granted a peremptory writ of mandamus as prayed. The plaintiff in error filed a motion for a new trial, which was overruled, and an exception was taken to the ruling thereon. The petition and the affidavits attached to the answer are exceedingly long, and, for a proper understanding of the questions presented, it is not deemed necessary that they be reported. It is sufficient to say that the facts set up in

the application are controverted by the affidavits attached to and made a part of the answer, so that without proof being offered to support the allegations of the petition a peremptory writ of mandamus could not properly issue. The facts contained in the numerous affidavits read by the defendants in error fully sustained the allegations of the petition. Under the provisions of the Code, when an order to show cause why an order for a peremptory writ should not issue is made and served upon the defendant, and no sufficient showing is made why the act required should not be performed, a peremptory writ of mandamus may issue, if it appears on the face of the application that the relator's right thereto is clear. But when the facts upon which the application is based are disputed on the hearing of the order to show cause, an alternative, and not a peremptory, writ must be first issued. Code 648; *Schend v. Society*, 49 Wis.. 237, 5 N. W. Rep. 355; *State v. Supervisors*, 64 Wis. 220, 24 N. W. Rep. 905. When cause is shown why a peremptory writ should not be allowed, an issue must be formed which is made up by the issuing of the alternative writ and the defendant's answer thereto. If no answer is filed the peremptory writ may issue. Error was committed in determining the case on affidavits, over the objection of the plaintiff in error. Section 653 of the Code of Civil Procedure provides that "no other pleading or written allegation is allowed than the writ and the answer. These are the pleadings in the case, and have the same effect, and are to be construed and may be amended in the same manner, as pleadings in a civil action, and the issues thereby joined must be tried, and the further proceedings thereon had in the same manner as in a civil action." It expressly provides that the issues joined in proceedings for mandamus must be tried in the same manner as in a civil action. The facts cannot be determined on ex parte affidavits against the objection of a party. The facts must be established by testimony taken by depositions, or by calling witnesses, so that an opportunity can be had to cross-examine the witnesses. *State v. Supervisors*, 64 Wis. 218, 24 N. W. Rep. 905. The peremptory writ issued in the case will be treated as an alternative writ, and the cause will be remanded with leave to the plaintiff in error to answer, and for further proceedings. Judgment accordingly. Other judges concur.

See *Kendall v. United States*, 12 Pet. (U. S.) 524; *Kentucky v. Dennison*, 24 Howard (U. S.) 66; *People v. Colborne*, 20 How. Pr. (N. Y.) 378; *State v. New Haven, etc., Co.*, 41 Conn. 134; *Belmont v. Reilly*, 71 N. Car. 260. Under the California Codes Mandamus is a special proceeding. *Rosenbaum v. Board of Supervisors*, 28 Fed 223. So also in N. Dak., *State v. Carey*, 49 N. W. 164. See also *State v. Lewis*, 76 Mo. 370.

Although to a considerable extent modified by statutory provisions, the jurisdiction of the courts in Mandamus is still governed by the common law rules. *Kimball v. The Union Water Co.*, 44 Cal. 173.

Having all the elements of an action at law, the proceeding in Mandamus is regarded generally as an original proceeding or suit, rather than a final process or execution. *McBane v. People*, 50 Ill. 503.

All courts of general common law jurisdiction have usually the right to issue the writ. Jurisdiction is frequently conferred upon appellate courts by statute in the various states. In all cases such courts are held to have authority to issue the writ in aid of their appellate jurisdiction. Original jurisdiction has never been conferred upon the Federal Courts, and when the writ is issued by these tribunals it is in the nature of an ancillary writ, to aid a jurisdiction already obtained. *Marbury v. Madison*, 1 Cranch (U. S.) 137; *Smith v. Jackson*, 1 Paine (U. S.) 453; *McEntire v. Wood*, 7 Cranch (U. S.) 504; *United States v. Ry. Co.*, 2 Dill. (U. S.) 527 *Rosenbaum v. Board of Supervisors*, 28 Fed. 223; *Gares v. N. W. Nat. Bld., etc., Ass.*, 55 Fed. 209.

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4. Petitioner must show a clear legal right.

STATE EX REL. LORD v. SUPERVISORS OF WASHINGTON COUNTY.

1850. SUPREME COURT OF WISCONSIN. 2 Pinney (Wis.) 552.

JACKSON, J.—An application is made to this court for a peremptory mandamus, to be directed to the board of supervisors of Washington county, commanding them to proceed, under the act of the last session of the legislature, to let, to the lowest bidder, the contract for the erection of the county buildings, and to levy an additional tax upon the taxable property of the county for the purpose of defraying the expense and cost of their erection.

A writ of mandamus is the highest judicial writ known to our constitution and laws, and, according to long approval and well established authorities, *only issues in cases where there is a specific legal right to be enforced, or where there is a positive duty to be and which can be performed, and where there is no other specific legal remedy*. Where the legal right is doubtful, or where the performance of the duty rests in discretion, a writ of mandamus cannot rightfully issue. *Kendall v. United States*, 12 Pet. (U. S.) 613; 18 Wend. (N. Y.) 89; 5 Binn. (Pa.) 103; 12 Johns. (N. Y.) 416; 1 Cowp. (K. B.) 423.

Tested by these principles of law, should the present application be granted?

The following is the act which is sought to be enforced by this writ:

“The board of supervisors shall, on the first Monday of May next, proceed to let, to the lowest bidder, the contract for the erection of a good and commodious court-house, upon the plan and style generally

adopted by the different counties of this state, a good and sufficient jail, and good and commodious fire-proof clerk's and register's office, upon grounds in the village of Port Washington, to be located by the supervisors of the county of Washington; said buildings to be erected and ordered during the summer of 1850, and finished by the first of July, 1851; and for the purpose of defraying the expense and cost of erecting said buildings, the said supervisors are directed to levy an additional tax upon the taxable property of said county, in addition to the ordinary taxes of said county for the year 1850, equal to the amount of the contract price of said buildings."

Various objections were raised by the respondents, and ably argued to this court, which it is not necessary to decide, among which is the constitutionality of the act of 1850.

The court are all of the opinion that the power to award the writ in a case like the present, is clearly conferred by the constitution and laws of this state. Nor is there any division of sentiment in regard to the operation of the law of 1847, by which the county seat of Washington county was located at the village of Port Washington for a period of five years. There cannot be two separate and distinct locations at one and the same time; nor can there be a right of reverting or returning to a former location, without an express law to that effect. In this case there is none.

The act of 1847 operated as an abrogation of all previous acts on that subject, and when the term of five years expires there will be no established location of the county seat of Washington county.

It will be the duty of the legislature, on the happening of that event, to provide by law for the establishment of a new location, and that can be done without any conflict with the provision of the constitution regulating the removal of county seats. But until the legislature shall make some additional statutory provision touching the permanent or temporary location of the county seat, it must be regarded as fixed at Port Washington. § 8, art. 13, Const.

The main objection to the allowance of the writ prayed by the relator arises from the vagueness and uncertainty of the law prescribing the duty of the respondents.

The board of supervisors were required, on the first Monday of May, 1850, to "proceed to let, to the lowest bidder, the contract for the erection of a good and commodious court-house." No provision is made for advertising or obtaining proposals, and it might well have happened that there would be no bidders, in which case the respondents could not have let the contract in the manner required by law. Nor was there any provision made for the purchasing or obtaining a site for the county buildings; and it would seem to me to be unreasonable, if not impracticable, to compel a board of supervisors to contract for the erection of a court-house, jail, and clerk's office, without naming any place or lot for their location, and when it is not known where in fact they were to be erected.

But I have a much greater difficulty with another clause of the act. The respondents are required to enter into a contract for the erection of a good and commodious court-house, "upon the plan and style generally adopted by the different counties of this state." There is no criterion that I am aware of, by which to determine what is the "plan and style generally adopted by the different counties of this state," in the erection of their court-houses. It is believed that there are no two court-houses in the state that are alike in their form, material, dimensions and arrangements. Every member of the board of supervisors might have his individual opinion, and maintain with equal sincerity, that his plan and style approached the nearest to the "plan and style generally adopted." And the members of this court might be equally variant in their own views upon the subject.

It is clear, therefore, to my mind, that there is not, in this case, on the part of the relator, a specific legal right to be enforced, nor, on the part of the respondents, a positive duty to be performed, and one that can be performed.

While, therefore, in a case wherein the facts were such as to justify the awarding of a writ of mandamus, this court would not hesitate to interpose its authority to compel any individual or public body to discharge a duty, or perform an act required by law, I am satisfied that this is not one in which it would be safe or proper to exercise such authority.

The writ must be denied.

Dissenting opinion by Stow, C. J., having no bearing on the question of discretion in issuing the writ, is omitted.

See also *Tarver v. Commissioners, etc.*, 17 Ala. 527; *Ex parte Good*, 19 Ark. 410; *Peck v. Booth*, 42 Conn. 271; *McCoy v. State* (Del.), 36 Atl. 81; *People v. Masonic Ass.*, 98 Ill. 635; *State v. Trustees, etc.*, 114 Ind. 389; *Rosenthal v. State Board, etc.* (Kan.), 32 Pac. 129; *Shine v. Kentucky, etc.*, R. Co., 85 Ky. 177; *Townes v. Nichols*, 73 Me. 515; *Att'y Gen. v. New Bedford*, 128 Mass. 312; *Loomis v. Rogers Township*, 53 Mich. 135; *State Board of Education v. West Point*, 50 Miss. 638; *Williams v. Judge, etc.*, 27 Mo. 225; *Hulse v. Marshall*, 9 Mo. Ap. 148; *State v. Kinkaid*, 23 Neb. 641; *Elizabeth v. County Court*, 49 N. J. L. 626; *People v. Easton*, 13 Abb. Pr. N. S. (N. Y.) 159; *State v. Justices*, 2 Ired. L. (N. Car.) 430; *People v. Hoyt*, 66 N. Y. 606; *Dutton v. Hanover*, 42 Ohio St. 215; *Easton v. Lehigh Water Co.*, 97 Pa. St. 554; *Sweet v. Conley* (R. I.), 39 Atl. 326; *State v. County Commissioners* (S. Car.), 9 S. E. 692; *Depoyster v. Baker*, 89 Tex. 155; *Free Press Ass. v. Nichols*, 45 Vermont 7; *Milliner's Adm. v. Harrison*, 32 Gratt. (Va.) 422; *United States v. Bank of Alexandria*, 1 Cranch (U. S.) 7.

5. Discretion in granting the writ.

EFFINGHAM ET AL. V. HAMILTON.

1891. SUPREME COURT OF MISSISSIPPI. 68 Miss. 523, 10 So. 39.

APPEAL from circuit court, Holmes county; CAMPBELL, Judge.

Mandamus by Effingham, Maynard & Co. to compel G. T. Hamilton, superintendent of schools of Holmes county, to sign a contract with petitioners for supplies of books for the public schools. Act Miss., February 22, 1890, Laws, p. 86, provides that a committee of teachers shall be appointed in each county of the state to select a uniform series of text books for the schools; and that, after the committee has made a selection, it shall be the duty of the county superintendent to enter into contract with the publishers for supplies of such books. The committee appointed in Holmes county selected the books of the petitioners, but the superintendent refused to sign the contract required by the statute. From an order sustaining a demurrer to the petition, the petitioners appeal. Affirmed.

CAMPBELL, J.—Upon the facts stated in the petition before us, and which upon demurrer must be taken as true, the right of the petitioners to have a contract made with them by the defendant, and to have their books, selected by the committee on the 6th of October, taught in the public schools of Holmes county, is indisputable. The refusal of the defendant to contract with them, as required by law, is wholly indefensible. He had no discretion about it. His plain duty was to proceed to contract, in pursuance of the action of the committee, and then “to see that only the adopted text-books are used” in the schools; and, if this were a matter affecting only the parties to this action, there could not be a doubt of the right of the petitioners to compel a performance of his official duty by the defendant in the matter wherein they have a pecuniary interest. *But it is not in every case of clear legal right, and the absence of a sufficient legal remedy, and where, therefore, mandamus is an appropriate remedy, that it will be issued. It is settled by numerous decisions that a sound judicial discretion is to be used, and, where circumstances make it unwise and inexpedient to allow this writ, to refuse it when sought to enforce a merely private right.* 14 Amer. & Eng. Ency. Law, 97, and cases cited; State v. Board, 24 Wis. 683; People v. Board, 27 N. Y. 378. We are therefore called on to consider the situation, and determine the propriety of refusing the writ. The petition shows that for some reason, after the action by the committee to select text-books on October 6th, and its dissolution, the state board of education (assuming, as its order shows, that the text-book committee of Holmes county at their meeting on October 6th, 1890, failed to adopt a complete list of books for use, etc.) di-

rected the defendant to reconvene the committee to supply the omission, and, acting upon this, he attempted to reconvene the committee, and appointed others to take the places of those who refused to meet again; and at a meeting of the committee thus constituted (consisting of some of the former committee and some substitutes), on November 8th, there was a revocation of the former action as to the books published by the petitioners and a selection of others, and in pursuance of this action the books of other publishers have been contracted for and introduced into the schools, and are being taught. We are thus informed that a committee claiming the right to act has revoked former action on which the right of the petitioners is founded, and that its action has been carried out so far as to result in a contract with other publishers whose publications have been introduced into the schools. The patrons of the school have gone to the expense of procuring the books, as we must assume, and the teachers are required by the superintendent of education to teach these books, and have no discretion about it. In view of these complications, and the evil consequences likely to arise affecting public interest, we deem it proper to deny the remedy sought. It is to be remembered that the object of the law providing for the selection of a uniform series of text-books for the public schools, and of all its provisions, was for the benefit and protection of the people, and not of book publishers; and, while they may acquire rights, and be entitled to their enforcement and protection in proper cases, they must be subordinated to the public interest as to the particular remedy here invoked. Affirmed.

In Wisconsin and Connecticut the rule has been laid down that the court may exercise its discretion in cases where the writ is sought in aid of private rights, but where it is invoked on behalf of the state, it issues *ex debito justitiæ*. State v. Doyle, 40 Wis. 220; New Haven, etc., Co. v. State, 44 Conn. 390.

See also, on subject of discretion in granting or refusing the writ: Reg. v. All Saints, 35 L. T. N. S. (Eng.) 381; Union, etc., Ry. Co. v. Hall, 91 U. S. 343; Maddox v. Neal, 45 Ark. 121; Chesebro v. Babcock, 59 Conn. 217; Weidwald v. Dodson, 95 Cal. 450; People v. Highway Com'rs., 4 Ill. App. 391; Chance v. Temple, 1 Ia. 179; Bd. of Education v. Spencer, 52 Kas. 574; Daniel v. Warren Co., 1 Bibb (Ky.) 499; Davis v. York Co., 63 Me. 396; Osborne v. Lindow, 78 Mich. 606; State v. Ass. Press, 159 Mo. 410; People v. Newton, 126 N. Y. 656; State v. Shaw, 43 Ohio St. 324; State v. Burnell, 104 Wis. 246.

6. Not granted if there is another adequate remedy.

SULLIVAN v. ROBBINS.

1899. SUPREME COURT OF IOWA. 109 Iowa 235, 80 N. W. 340.

DEEMER, J.—The petition and amendment thereto disclose that a certain highway in Mahaska county, which was duly established more than thirty years ago, is and was so obstructed so as to be impassable, and that defendant was duly notified before the commencement of the action to remove the said obstructions, but that he had failed and neglected to do so. It also appears that the board of supervisors, on a petition signed by plaintiff and others, vacated a part of the road which plaintiff says is obstructed, and reduced the remainder from 50 to 30 feet in width. The petition alleges that plaintiff's signature to the petition asking for the vacation and reduction of the road was obtained through fraud, and that the action of the board was illegal, (1) because no road can be reduced to less than 40 feet in width; (2) because no petition or bond was filed with the county auditor, and no commissioner was appointed to examine into the expediency of the proposed vacation, and no report was ever filed with the county auditor; (3) because no notice was ever served upon adjoining landowners; and (4) because no notice of the hearing was given to any person whatever. The demurrer was based upon several grounds, some of which were that this is a collateral attack upon the action of the board; that the proper remedy is by certiorari and not by mandamus; and that the board of supervisors have exclusive jurisdiction of the highways in their county.

It will thus be seen that this is an attack upon the action of the board in vacating the highway. The statute provides that boards of supervisors have general supervision of the roads in their counties, with power to establish, vacate and change the same. It appears that a petition asking for the vacation of the road was duly presented to the board, and that it granted the petitioners' request. True, no bond was filed, but that fact will not invalidate the proceedings. *Woolsey v. Board*, 32 Iowa 130.

It also appears that a part of the road was altered so as to be less than 40 feet in width, but that it is not such an irregularity as can be taken advantage of in a collateral proceeding. *Knowles v. Muscatine*, 20 Iowa 248.

That plaintiff was induced to sign the petition for vacation through fraud is no reason for declaring the action of the board void. Indeed, the only fraud alleged is that he was misled into signing the petition because he believed it pertained to some other road.

Surely this is not a ground of collateral attack upon the action of the board.

It is true that no commissioner was appointed to pass upon the expediency of the proposed vacation, but as the plaintiff and all parties in interest, so far as disclosed by the record, signed the petition, they are in no position to complain. A commissioner was appointed to make the survey of the new road established in lieu of the old, and he made a survey and made his report.

The notice required by Section 1495 of the Code is for the purpose of giving the owners of land living along or abutting on said road an opportunity to object to the establishment or vacation thereof, or to present their claims for damages. As plaintiff had signed the petition, no notice to him was required, unless it be for the purpose of presenting a claim for damages. But he does not say in his petition that he had any claim. Indeed, it would seem that he has no basis for such a claim for the vacation of the road. *Grove v. Allen*, 92 Iowa 519, 61 N. W. 175; *McKinney v. Baker*, 100 Iowa, 362, 69 N. W. 683. Again, there is no such showing in the petition as would require the giving of notice. *McKinney v. Baker*, *supra*.

The claim that no petition was filed for the vacation of the road is without merit. Indeed, plaintiff's petition alleges that it is the road which he seeks to have opened which was vacated. If there were no such allegation, we think it clearly appears from the whole record that it is the same road.

The policy or expediency of the alleged vacation cannot be controlled by action of mandamus. From what has been said, it appears that none of the irregularities complained of go to the jurisdiction of the board to make the order. If that tribunal acted illegally, certiorari is the proper remedy. *McCrary v. Griswold*, 7 Iowa 248; *Tiedt v. Carstensen*, 61 Iowa 334, 16 N. W. 214. The statute provides that mandamus shall not issue in any case where there is a plain, speedy and adequate remedy in the ordinary course of law. Code, 4344. Section 4154 of the Code provides that the remedy, in cases when an inferior board exercising judicial functions has exceeded its jurisdiction, or is otherwise acting illegally, is by certiorari. *Abney v. Clark*, 87 Iowa 727, 55 N. W. 6; *Moffit v. Brainard*, 92 Iowa 122, 60 N. W. 226; *Stubenrauch v. Neyenesch*, 54 Iowa 567, 7 N. W. 1; *Rockwell v. Bowers*, 88 Iowa 88, 55 N. W. 1; *McLachlan v. Gray*, 105 Iowa 259, 74 N. W. 773. It is clear that plaintiff cannot collaterally attack the action of the board of supervisors in vacating the highway, by action of mandamus. Affirmed.

STATE EX REL. BETTS ET AL. V. MEGOWN.

1886. SUPREME COURT OF MISSOURI. 89 Mo. 156, 1 S. W. 208.

SHERWOOD, J.—There are two reasons why the circuit court properly refused to grant the peremptory writ to compel the probate court to grant the letters *de bonis non*.

I. Mandamus will not lie to control the judgment or discretion of an inferior court; for this in effect would be to substitute the opinion of the superior for that of the inferior court. *Barksdale v. Cobb*, 16 Ga. 13; High Ex. Legal Rem., §§ 156, 171, 176.

II. Mandamus will not lie in this instance because relator has other and specific remedy by appeal. The existence of such a remedy bars the exercise of jurisdiction by mandamus; *for such a writ is not to usurp the functions of a writ of error or appeal, or to correct errors that may be corrected in that way*. High Ex. Legal Rem., § 188. And the status of the case would not be affected if the judgment of the inferior court was manifestly erroneous, if the question passed upon was within the jurisdictional powers of the court adjudicating upon it. *Ib.* § 189. Of its jurisdiction there can be no doubt. And in this case the right and remedy of appeal do exist. Revised Statutes, section 292, is ample in its provisions for an appeal, and there has been a final decision of the matter by the probate judge.

The result is that the judgment should be affirmed. *Affirmed*. All concur.

PEOPLE V. SUPERVISORS OF GREENE.

1851. SUPREME COURT OF NEW YORK. 12 Barb. (N. Y.) 217.

MOTION for a peremptory mandamus. On the 21st of November, 1851, an alternative mandamus was granted, at a special term, directed to Rufus H. King, supervisor of the town of Catskill, Geo. S. Nichols, supervisor of the town of Athens, and to the supervisors of the several other towns in the county of Greene, by name, reciting that they, as the board of county canvassers, had illegally and unjustly rejected, in making their canvass, the original statement of the canvass in the third election district in the town of Catskill, and had illegally and unjustly refused to count and canvass the votes of that district, and had therefore caused to be made and recorded false statements of the results of the election in the county of Greene, and had therefore unjustly determined, among other things, that Lyman Tremain was duly elected to the office of county judge, to the

grievous wrong of the relator, who should have been declared to be elected, and commanding them, and each and every of them, "to meet at the office of the clerk of the county of Greene, on the 28th of November, 1851, at one o'clock p. m., or at an earlier day if they should elect so to do and to then and there to reorganize the said board of county canvassers and correct the estimates of the votes of said county, and the several statements and determinations made thereupon by the said board, by allowing, counting, canvassing and estimating the votes as contained in the original statements of the canvas in said election district number three, in said town of Catskill, produced to them, and including the same in their estimate of the votes of the county of Greene, and in their statements made thereupon, and that they deliver to the clerk of the county such corrected statements, properly certified and attested, as required by law, to be recorded by him, and that thereupon they correct, in accordance with such corrected statements, the determinations theretofore made by them, the said board, as to the person or persons duly elected to any county office, by the greatest number of votes, or that they show cause to the contrary, before the justices of the supreme court, at the capitol, in the City of Albany, on the first Monday of December, then next, at a general term of the court, then and there to be held, lest complaint should again come," &c. The writ was served by delivering a copy "to each of the supervisors personally, at the town in which he resides, and showing to each the original writ under the seal of the court."

On the return day of the writ, the defendant's counsel, without making a return, objected to the allowance of a peremptory mandamus, upon several grounds, which are sufficiently stated in the opinion of the court.

By the court, HARRIS, J.—The first inquiry that presents itself, in the consideration of the case, is, whether, assuming the facts to be as stated by the relator, they furnish proper grounds for the interference of the court by mandamus. The general rule is that, when the subject matter is within its control, this court, as the general guardian of public rights, and in the exercise of its authority to grant the writ, will render it, as far as it can, the means of substantial justice in every case where there is no other specific legal remedy for a legal right, and will especially provide, as effectually as it can, that all official duties be fulfilled. Tapping Mand. 9; III Blackstone 110.

The object of the writ is, not to supersede legal remedies, but to supply the want of them. The only ground for its allowance is that, without it, there would be a defect of justice. Though it issues in the name of the people, it is substantially a civil remedy, granted to the relator. To entitle him to this remedy, two things must appear; *first, that he has a legal right to have something done by the party to whom he seeks to have the writ directed, and which has not been*

done; and, secondly, that he has no specific legal remedy to which he can resort to compel the performance of this duty.

Guided by these principles, let us examine the case as it is presented upon the face of the alternative mandamus. The board of canvassers illegally and unjustly omitted to count the votes of the third election district of the town of Catskill. The relator had a legal right to have these votes counted; the board, therefore, omitted to do an act which they ought to have done. There has been an omission to perform an official duty. For this omission, the relator ought to have a remedy, and if no other remedy exists, and the parties to whom the writ is directed *can yet perform the duty*, he ought to have a mandamus. If, on the other hand, the defendants cannot now perform the duty, even though they have erred in not counting the votes, the relator must look for some other remedy. A mandamus, if granted, would be unavailing.

The county board of canvassers, except in certain specified cases, is composed of the supervisors of the several towns in the county. The alternative mandamus assumes that the defendants, being such supervisors, constitute said board. This is not necessarily the case; but I will consider the question upon the assumption that this is so. The board met on the Tuesday following the election, and organized according to law. It then proceeded, though illegally and improperly, as it is alleged, to estimate the votes of the county and to make the statements prescribed by the statute. They also proceeded to determine who had been elected county officers. This determination, it may be assumed, was erroneous. But it was made, and a copy of the statements upon which it was made has been published. It has been filed, and has become a matter of record. The board has dissolved. Were the same individuals again to convene, they would not again constitute the county board of canvassers. No statute authorizes such second assembling, or prescribes its mode of organization. If convened and organized, it would have no legal authority to review its former acts or correct its errors. When the board deposited with the clerk the result of its canvass, and declared who were elected to office, and published that result and determination, all its powers were expended. If it had erred, the errors must be corrected by some other tribunal. The law has withheld from it the power of reviewing its own determinations.

But suppose the supervisors to reassemble and to assume the office of recanvassing the votes of the county. They have already determined that Lyman Tremain is elected to the office of county judge. If they should obey the mandamus, they might make a new statement and determination, showing that the relator is elected. The object of granting the writ of mandamus is, as we have seen, to provide an efficacious remedy to the relator, so as to prevent a failure of justice. Of what advantage would such a determi-

nation, made under such circumstances, be to the relator? The result would undoubtedly be, as now, that both parties claim to be elected county judge; both would take the requisite oath of office, and assume its duties, and the controversy, then as now, would only be determined by an action in the nature of a *quo warranto*. Such a revision of the canvass, therefore, if practicable, would produce no beneficial result, even to the relator himself. Instead of being an efficacious remedy, the writ, in its operation would be wholly abortive. When it can be foreseen that this must be the result, the writ should not be granted. "*Lex non cogit ad utilia.*" "The court will refuse the writ," says Tapping, "if it be manifest that it would be vain and fruitless, or cannot have a beneficial effect," Tapping Mand. 17. I am of the opinion, therefore, that, assuming the board of canvassers erred in rejecting the votes of the third election district of the town of Catskill, it is now too late for the canvassers to correct the error. The matter has passed beyond their jurisdiction or control. If the defendants, moved by the command of this court, or otherwise, should undertake such correction, their action would be wholly ineffectual for the purposes for which the relator seeks to enforce it. Nothing short of a *quo warranto* action can determine his right to the office.

I will not say that a state of facts might not occur which would call upon the court to interfere by mandamus to control the action of a board of canvassers, but this can only be done when such board is in existence. And even then, the nature of the duties to be discharged by it is such, that it can rarely be expedient or practicable thus to interfere. But, when the board having performed the office for which it was constituted, whether legally or not, has been dissolved, it is incapable of being reanimated. Any act it should attempt to perform, even though it be done in obedience to the mandate of this court, would be extra-official and nugatory.

Nor does the relator need this writ. He has another and a more efficacious remedy. I agree with him, that it is not an answer to an application for a mandamus to show that some other remedy exists against some other party. It would not, of itself, be enough for the defendants to show that the relators can obtain relief by *quo warranto* against the person whom they have declared to be elected. This principle only prevails when such other remedy is attainable against the same party to whom it is sought to have the mandamus directed. I prefer to put the refusal to grant the writ upon the ground that it is inappropriate and ineffectual, and that, by withholding it, we do not leave the relator without an appropriate and effectual remedy.

The ancient and appropriate proceeding to try the right and title to all offices, says a very learned judge, was under the writ of *quo warranto*; and that where a legal question was involved, this was the only mode of determining it. By the Revised Statutes,

this old remedy is not only preserved, but rendered more expeditious and manageable, and it is declared to be especially applicable, "when any person shall usurp, intrude into, or unlawfully hold or exercise any public office." (2 R. S. 581, § 28. See also Code of 1851, § 432.) "Provision is made for the determination of issues of law and fact. The right of trial by jury, so vital to the due decision of the latter, is expressly maintained and declared. This, then, is emphatically the constitutional mode of proceeding for the trial of the title to offices." (The People v. Stevens, 5 Hill (N. Y.) 631, n. a, per Kent, C. Judge.)

The motion for a peremptory mandamus must therefore be denied.

In accord: *People v. Corporation of N. Y.*, 3 Johns. Cas. (N. Y.) 79; *Bonner v. State*, 7 Ga. 473; *State v. Rodman*, 43 Mo. 256; *State v. Gasconade Co. Ct.*, 25 Mo. Ap. 446; *Anderson v. Colson*, 1 Neb. 172; *Rex v. ———* 7 Ad. & El. 419; *Rex v. Phippen*, 7 Ad. & El. 966.

A different rule appears to obtain in Massachusetts. See *Luce v. Board of Examiners*, 153 Mass. 108; *Keough v. Board of Aldermen*, 156 Mass. 403.

KING WILLIAM JUSTICES v. MUNDAY.

1830. COURT OF APPEALS OF VIRGINIA. 2 Leigh (Va.) 165.

AN order was made by the county court of King William, appointing three commissioners "to meet and confer with commissioners appointed by the county court of King and Queen, and agree on the manner and condition of executing a bridge, to be erected across the Mattapony River from the land of J. K. in King and Queen to the land of J. H. in King William." But, when this order was made, there were only five justices on the bench, out of seventeen, who were in the commission of the peace for the county; and no order had been made or entered of record, at a previous term, signifying the intention of making the above or any other order on the subject, and directing the sheriff to summon the justices of the county to attend at the next term for the purpose.

The commissioners reported to the county court of King William, that in conformity with the orders of the two county courts, they had let the building of the bridge across the Mattapony, to be kept in repair for seven years, to B. H. Munday for the sum of \$500.00; and that the undertaker had built the bridge, according to the contract of the clerk of the county court of King and Queen, and had given bond with surety for keeping the same in repair for the term aforesaid.

Munday, the undertaker, applied to the county court of King William (then sitting to make the county levy, and fifteen of the

justices being on the bench) to levy the proportion of the price of the bridge, properly chargeable on that county, and to order the same to be paid to him, which the county court refused to do, by a vote of ten to five of the justices present.

Upon this, Munday applied to the circuit court of King William for a mandamus to the justices of the county court, which was allowed, commanding them to levy the money for him, or show cause to the contrary.

The county court made a return, in which, after reciting the provisions of the statute, 2 Rev. Code, ch. 236, § 9, p. 237, that "no order for the erection of any bridge or bridges, shall be made by the court of any county, unless a majority of the judges of said county shall be present at the making of said order, or unless the court of such county shall have signified their intention of making such order, at least one month previous thereto, and shall have caused the same to be entered of record, with directions to the sheriff of the county to summon the justices thereof to attend at the next term for the purpose aforesaid;" the court showed that a majority of the justices of King William were not present at the time of making the order appointing the commissioners on the part of that county, to meet and confer with those of King and Queen, as to the building of the bridge in question, and that no previous order had been made signifying the intention of making such order, and directing the justices of the county to be summoned to attend for the purpose: and that the court refused to levy any portion of the money claimed by the undertaker on the county of King William, (1) because the order, and the whole proceedings were contrary to the law and irregular; and (2) because no evidence was adduced to convince the court that the bridge was or would be of public utility and convenience.

Munday demurred generally to the return, and the justices joined in the demurrer.

The circuit court sustained the demurrer and ordered a peremptory mandamus. And to that judgment, this court, at the instance of the justices of the county court, awarded a supersedeas.

CARR J.—The counsel for the appellants took two objections to the proceedings: (1) that a mandamus was not the proper remedy; (2) that there should have been a majority of the justices of King William on the bench, or proof that they had been summoned to attend, when the order was made appointing commissioners to meet those of King and Queen. It will only be necessary to notice the first of these points, if it be decisively settled, that where there is another specific remedy the mandamus will not lie. A brief examination of some of the cases will abundantly show this. In *Rex v. Barker*, 3 Burr. (K. B.), 1267, Lord Mansfield said, "A mandamus is a prerogative writ.—It ought to be used upon all occasions, where the law has established no specific remedy, and,

where in justice and good government there ought to be one." "The value of the matter, or the degree of its importance to the public police, is not scrupulously weighed: if there be a right, and no other specific remedy, this should not be denied." And, in *Rex v. Bank*, 2 Doug. (K. B.), 526, he said, "Where there is no specific remedy, the court will grant a mandamus, that justice may be done." In the case of *King v. Stafford*, 3 T. R. (K. B.), 651, on an application for a rule, to show cause why a mandamus should not issue to command the defendant, as lord of the manor, to present to the ordinary, one Moreton, nominated by the inhabitants of Willenhall, to be curate of that chapel, Lord Kenyon said, "It seems as if the inhabitants have only an equitable right. If so, this court cannot interfere at all; or if they have a legal right, such right may be asserted on a *quare impedit*. Therefore, *quacunque via data* this rule must be discharged." The *King v. Bishop*, 1 T. R. (K. B.), 404; *The King v. Canterbury*, 8 East (K. B.), 213. *Rex v. Dean*, 2 Mau. & Sel. (K. B.), 80. In 4 Bacon Abr. Mandamus, C. P. 506, it is laid down, that it is, in general, a sufficient reason with a court to refuse a mandamus, that the party applying for it has another specific remedy; and many cases are quoted in support. It seems an exception to this general rule, that the remedy is obsolete, or inconvenient, or incomplete: in such cases the court exercises a sound discretion in the granting or refusing the writ. In our legislation, I find nothing to change this settled course of the law. The statute, 1 Rev. Code, ch. 121, p. 471, merely regulates the mode of proceeding on writs of mandamus, without prescribing when they shall be granted or refused. In *Dew v. The Judges*, 3 Hen. & M. (Va.) 1, the subject is touched upon, but only incidentally, the case there being evidently the proper one for the writ. The law being thus settled, we are only to inquire, whether the petitioner for this mandamus has a specific legal remedy? And this is answered from the passage cited from the 9th section of the statute, 2 Rev. Code, ch. 236, "and all such contracts made by county courts, or others appointed by them, shall be available and binding upon the justices and their successors, so as to entitle the undertaker to his stipulated reward in the county levy, or to a recovery thereof with costs, by action of debt against the justices refusing to levy the same."

The other judges concurred, and the judgment was reversed, refusing to levy the same."

See also *Fogle v. Gregg*, 26 Ind. 345; *State v. Supervisors*, 29 Wis. 79; *Ex parte Mackey*, 15 S. Car. 322; *Marshall v. Sloan*, 35 Ia. 445; *Louisville, etc., R. Co. v. State*, 25 Ind. 177; *Missouri v. Murphy*, 170 U. S. 78; *Boyne v. Ryan*, 100 Cal. 265, 34 Pac. Rep. 707; *Gunning v. Sheahan*, 73 Ill. App. 118; *Potts v. Tuttle*, 79 Ia. 253, 44 N. W. Rep. 374; *Talbot Paving Co. v. Detroit*, 91 Mich. 262, 51 N. W. Rep. 933; *State v. Otero*, 52 La. Ann. 1, 26 So. Rep. 812; *State v. Elwood*, 11 Wis. 17.

The writ has been refused where the act was impossible of performance, where nought but an abstract right appeared to be involved, where there had been an unreasonable delay on the part of relator, where other proceedings involving the subject matter were pending and where the amount involved was relatively insignificant.

MOBILE, &c., R. CO. v. WISDOM.

1871. SUPREME COURT OF TENNESSEE. 5 Heiskell (Tenn.) 125.

NICHOLSON, C. J. delivered the opinion of the court.

This is a proceeding by mandamus to compel the Mobile & Ohio R. R. Company to receive, in payment for freight or passage on the road, certain tax receipts, given by the tax collector of Madison county, Tenn., and countersigned by the County Court Clerk of said county.

The petition was filed on the 2d of January, 1869, and exhibits three tax receipts, amounting in all to about \$24.00, none of which were issued to petitioner, nor assigned to him by endorsement. He alleges that he is the holder of the receipts by delivery, and that he tendered the same in payment for a ticket from Jackson to Mobile, but that the agent of the company refused to receive them in payment for said ticket. An alternative mandamus issued, requiring the company to appear and show cause why the alternative mandamus should not be made absolute. The company appeared and moved to quash the writ, and assigned various reasons why the motion should be sustained. The Circuit Judge determined that the reasons were insufficient, and overruled the motion, and thereupon gave judgment, making the mandamus absolute. From this judgment the company appealed in error to this court.

We deem it unnecessary to notice, in detail, the several objections taken to the petition, for want of sufficient certainty and definiteness in its several allegations, as these objections are merely technical, not reaching the merits of the case, and as the petition, if insufficient as to a matter of mere form, is amendable. But we are satisfied that there are no substantial defects in the averments of the petition, and will proceed to examine the objections that reach the merits of the case.

(The court held that under the statute such tax certificates were transferable by delivery, and that under the terms of its charter, and the subscriptions made in aid of the road, the railroad was liable for the redemption of these certificates.)

3. It is next said that the writ of mandamus is not a writ of right and is not granted as a matter of course—that it only lies where the law has established no specific remedy, nor where satisfac-

tion equivalent to a specific remedy can be had. Hence it is inferred that, as the petitioner might have had his action on the case for damages, therefore he cannot have the benefit of the writ of mandamus. This argument assumes that the action on the case furnishes an equivalent satisfaction to a specific execution of the obligation—that is, assuming the very question at issue. The petitioner has a right, as he says, to buy a railroad ticket to Mobile, and to pay for it with his tax receipt. The company say, true, we are bound to receive your tax receipt for a ticket, but we choose to require you to pay the money, and you can sue us for damages for violating our contract; when you get your money, that will be equivalent to your tax receipt, and you can then buy your ticket to Mobile. It is far from being clear that the remedy by action for damages would be equivalent to a specific execution of the obligation. It might be that a judgment against the company would not be readily convertible into money.

It is a general rule that whenever a statute gives power to, or imposes an obligation on, a particular person to do some act a duty, and provides no specific remedy on non-performance, a mandamus will be granted: Tapping Mand. 80; Winters v. Burford, 6 Cold. W. (Tenn.) 330.

Moses Mand. p. 14, lays down this as the rule: "It will, therefore, be observed that it is one of the remedies resorted to when a person desires to be placed in the possession of a right illegally and unjustly withheld from him. It does not award damages as a compensation for an injury, but it seeks to give the thing itself—the withholding of which constitutes the injury complained of." And he adds: "The office of the writ of mandamus is very extensive. It has been said that it is the supplementary remedy when all others fail."

Again, at p. 18, he says: "That although the power to issue the writ in America is not regarded as a prerogative power, yet it so far partakes of the nature of a prerogative writ, that the court has the power to issue or withhold it, according to its discretion. *But this discretion is not an arbitrary one: it is a judicial discretion*, and when there is a right, and the law has established no specific remedy, this writ should not be denied." 7 Cush. (Mass.) 226; Angel & Ames Corp. §§ 699-710. Redfield Railways, Vol. 2, p. 279, says: "No better rule can be laid down, than that where the charter of a corporation, or the general statute in force, and applicable to the subject imposes a specific duty, either in terms, or by fair and reasonable construction, and implication, and there is no other specific or adequate remedy, the writ of mandamus will be awarded."

We deem it useless to cite other authorities to the effect, that whenever there is a right that has been illegally and unjustly withheld, and there is no other specific adequate remedy, the writ will be issued, and private persons, as well as the public, are entitled to

its benefits. *Withers v. Burford*, 6 Col. 328; *Angel & Ames Corp.* §§ 704-707.

In the case before us, the legal right is clear, the obligation created by the general statute, and the acceptance of its provisions and benefits by the company is obvious, and the withholding of the right is illegal and unjust. It is equally obvious that there is no specific adequate remedy provided by the law which created the right and the obligation.

It appears by reference to the act of 1852 that its leading object was to give assistance to the railroads then struggling into existence by authorizing the people of counties to subscribe for stock, and to pay the same by imposing taxes on themselves. This assistance was sought for and accepted by the companies, not so much to swell the number of their subscribers for stock, as to procure the material aid to be furnished by taxation. To secure this object, the Mobile & Ohio R. R. Company not only agreed that the counties so furnishing aid should be represented in the company, but that every individual who should buy up \$100.00 of the tax receipts should become a stockholder, and in addition to this, that every holder of the tax receipts, who preferred to invest his tax receipts in freight or passage on the road, should have the right to do so. The acceptance of the assistance from the county of Madison imposed all these obligations on the united corporation represented by its officers. Each of these obligations is equally binding on the corporation, and after having accepted the taxes and used them for the common benefit in building the road, they cannot now repudiate any of the obligations thus assumed.

4. It is next objected, that the writ in this case is sued out, not so much to have the right of the petitioner enforced, as to the three tax receipts exhibited in his petition, as to test the question, with the view of having a decision that will be applicable to many other like receipts. We are unable to appreciate the force of this objection. As far as we are able to see, the petitioner has sued out the writ in good faith to have his rights determined in the specific case presented. It can surely be no reason for our withholding from him his rights, that he or others may have other similar rights that may be settled by this adjudication. It is our duty to determine causes brought regularly before us, according to law, and to leave the consequences of our decision on other cases to have their legitimate weight.

It results that we find no error in the action of the Circuit Judge in refusing to quash the writ and petition, and we affirm his judgment for a peremptory mandamus. Affirmed.

Under the statute of Illinois, the remedy by Mandamus is not affected by the existence of another legal remedy. Ill. Stat., c. 87, § 9.

PEOPLE EX REL. TOWNSHIP OF LA GRANGE v. THE
STATE TREASURER.

1872 SUPREME COURT OF MICHIGAN. 24 Mich. 468.

CAMPBELL, J.—The relator having obtained an order on respondent to show cause why certain municipal bonds, deposited with him under the railroad aid laws, should not be delivered up, he returns that he has been served with a subpoena in a case in equity, issued out of the circuit court for the U. S. for the Eastern District of Michigan, under a bill filed by Joseph E. Young, of Chicago, Ill., against respondent, relator, and the Michigan Air Line R. R. Co., to obtain the same bonds for the company.

And this return being demurred to, respondent relies on two principal grounds: First, that mandamus is not a proper remedy in such cases, and second, that the pendency of the chancery suit should stay it. The latter question is first in order of importance.

It is not claimed that the pendency of a suit like that referred to can, in any way, operate as a bar to these proceedings. There is no authority for any such doctrine, and all practice is against it. The only argument insisted upon, is that in such cases comity requires that this court should await the final action in that suit—or at least that such delay is proper and desirable, and should be granted as a matter of customary policy. To ascertain how far it would be proper to do this each class of cases must be examined as it arises, and it is not possible that there can be any uniform rule on the subject. It must always be remembered that in considering such questions, it is not usually the court where action is had, but the parties that are taking it, that must be regarded.

Courts, except by appellate process, never interfere with each other's proceedings, and deal with the party themselves.

When we look at the nature of the bill that has been filed in the U. S. Circuit Court, we find its purpose so clearly in violation of legal principles, as settled generally (and as emphatically by the U. S. Supreme Court as anywhere), that we cannot hesitate to regard it as one over which the court where it is pending will not assume jurisdiction to grant relief. Its objects are not within the jurisdiction of any court of equity, as that jurisdiction has thus far been declared, and it is not very likely that any tribunal will entertain it.

We are then to consider whether a mandamus is the proper remedy for a refusal to comply with this duty.

It was urged on the argument that this writ will only lie where there is a positive statutory duty and an entire absence of any other remedy. And it is claimed that the decisions heretofore made sustain this view. We do not know of any such doctrine, and have

never understood it to have been established in this state or elsewhere. In the frequent instances of application for this writ, the occasion has quite as often been to enforce duties *not* imposed by statute, as obligations which were statutory. There may possibly be found isolated expressions which, apart from their context and the occasion of their utterance, might favor one of the grounds claimed. Thus, in *People v. Judges*, 1 Doug. (Mich.) 319, it was said that there must be "no other remedy." In that case there was a better remedy in the ordinary course of law, which reached all that could be desired. But in *People v. Judge*, 19 Mich. 296, the doctrine was laid down more guardedly, that the relator must show "a clear legal right, and that there is no other adequate remedy." And in *People v. Ins. Co.* 19 Mich. 392, it was expressed more fully that the writ might issue for a specific duty where there is no other "specific and adequate remedy."

Blackstone very clearly defines the jurisdiction in a few words. He says it lies, "where the party hath a right to have anything done, and hath no other specific means of compelling its performance." 3 Blackstone Comm. 110. In *Rex v. Windham*, 1 Cowp. (K. B.) 377, Lord Mansfield adopts a statement of Mr. Kenyon, "that where there is no other legal specific remedy to attain the ends of justice, the course must be by mandamus, which is a prerogative writ." In *Rex v. Barker*, 3 Burr. (K. B.) 1265, he says, "Therefore it ought to be used upon all occasions where the law has established no specific remedy, and where, in justice and good government there ought to be one. Within the last century it has been liberally interposed for the benefit of the subject, and the advancement of justice. The value of the matter, or the degree of its importance to the public police, is not scrupulously weighed. If there be a right, and no other specific remedy, this should not be denied." And in *Rex v. Cambridge*, 3 Burr. (K. B.) 1647, he says again, "This is the very reason of the courts issuing the prerogative writ of a mandamus, because there is no other specific remedy." The other judges were equally emphatic.

For most rights the ordinary legal remedies are ample to prevent a failure of justice, as upon private contracts a judgment for damages will usually suffice. But there are cases where, if contracts cannot be enforced specially, there will be a failure of justice; and as the law can give no specific remedy in the case, parties are compelled to resort to equity. If the law had the requisite machinery, no doubt it would so interfere as to render a resort to equity needless. And in all cases where it can enforce rights specifically, and no other relief is adequate, it certainly would be unjust not to do so. Unfortunately its powers are limited. But in cases where the right is clear and specific and public officers or tribunals refuse to comply with their duty, a writ of mandamus issues for the very purpose, as declared by Lord Mansfield, of enforcing

specific relief. It is the inadequacy, and not the mere absence, of all other remedies, and the danger of a failure of justice without it, that must usually determine the propriety of the writ. Where none but specific relief will do justice, specific relief should be granted if practicable. And where a right is single and specific it usually is practicable.

The question then arises whether there is any other adequate, specific legal remedy.

Courts of law do not, in deciding such questions, take into account remedies in equity. They may be regarded in determining the exercise of discretion in allowing the writ, but they cannot affect the jurisdiction. There is no case where a court of law has its jurisdiction cut off by the existence of equitable remedies. The rule is the reverse—that equity will not interfere if legal remedies are adequate. There is the strongest possible reason why a party should not be turned over to the tedious and dilatory process of a long suit, when there are no issues that need it. The only question that could arise in the class of cases now before us, is whether the bonds are in the possession of the respondent. If they are, the right to have them restored is a legal conclusion not open to question.

The same reasons would apply to render it improper to turn a party over to a suit in replevin, if there were not still more serious objections to it, as well as doubts of its applicability. The remedy would not involve a needless legal contention, but it is not a proper or legal thing to allow a sheriff, on such a writ, to intermeddle with public papers. The policy of the law requires them to be guarded by their official custodian, and it would be a monstrous abuse if the state offices could be exposed to the visitation of ministerial officers who might be commanded by a writ, issued without the previous order or supervision of a court, to seize upon and deliver over to any one, who should sue out the process, any document or muniment to be found there. Such a claim would be preposterous. A mandamus is the only admissible writ to command public officers to produce and give up papers in their custody.

The writ must be granted as prayed. And we trust it will not be necessary hereafter to interpose for the same purpose.

CHRISTIANCY, C. J., and COOLEY, J., concurred.

GRAVES, J., did not sit in the case.

Whether the pendency of a suit in equity will constitute a bar to relief by Mandamus depends wholly upon the extent and effect of the equitable relief sought. If the court of equity is in a position to afford complete relief, the petition in mandamus will usually be dismissed. See *Spelling Inj. and Ext. Rem.*, § 1376. *The Queen v. Pitt*, 10 Ad. & E. (K. B.) 272; *People v. Warfield*, 20 Ill. 160; *People v. Wiant*, 48 Ill. 263; *Smithee v. Mosely*, 31 Ark. 425; *State v. Custer*, 11 Ind. 210; *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 56 N. E. Rep. 1033; *Hardcastle v. Md., etc., R. Co.*, 32 Md. 32.

IN RE THE TRENTON WATER POWER CO.

1846. SUPREME COURT OF NEW JERSEY. 20 N. J. L. 659.

W. Halstead moved for a mandamus against the Trenton Water Power Co., directing them to erect a bridge over Delaware St. in the city of Trenton, where their main sluice or canal crosses the street.

S. G. Potts opposed the application, and insisted, 1st, that the company are not bound by law to build such bridge; 2d, if they are bound to do so, it is by no means a clear and unquestionable duty; and a mandamus cannot go in cases of doubtful right; and 3d, if the duty is clear, yet, there is a remedy by indictment; and the court will not award a mandamus, where the party has another remedy.

HORNBLOWER, C. J., delivered the opinion of the court.

As to the propriety of the remedy, supposing the obligation to be clear, there can be very little doubt. The fact that an indictment would lie, furnishes no objection, in a case of this kind. This was decided after full argument, in the case of *Rex v. Severn, &c. R. Co.* 2 Barn. and Ald. (K. B.) 646; and in the *State v. Holiday*, 3 Halst. (N. J. L.) 205.

The reasoning of the respective courts, in those two cases, is strikingly similar, although Judge C. J. Ewing does not cite the English case, and probably, had not seen a report of it. Chief Justice Abbott, in that case, remarks, "If an indictment had been a remedy, equally convenient, beneficial and effectual as a mandamus, I should have been of the opinion that we ought not to grant the mandamus; but I think it is perfectly clear, that an indictment is not such a remedy; for a corporation cannot be compelled, by indictment, to re-instate the road." The company in that case had taken up a branch of their road, which led to certain coal mines, and had opened another road to mines of their own; and the mandamus was applied for to compel them to relay their road, where they had taken it up. "The court may indeed," continues the Chief Justice, "in case of conviction, impose a fine; and that fine may be levied by distress; but the corporation may submit to the payment of the fine, and refuse to re-instate the road." In *State v. Holliday*, Chief Justice Ewing enters into a very elaborate argument on the subject and shows by authority, as well as on principle, that unless there be a legal and specific remedy, a mandamus will issue in cases of this sort, although an indictment would also lie. That was the case of refusal, by the overseer of the highway, to open, clear out, and make a certain road, within the limits assigned to his care, by the township committee. "It is manifest," says the Chief Justice, after enumerating the remedies, by presentment,

fine and penalty, given by the statute against the delinquent in such cases,—“it is manifest, that the penalty may be paid, or the fine satisfied; and yet, the road may not be opened, or cleared out, nor the public be enabled to enjoy the use of it. These remedies cannot then be denominated, specific.” Hence the Chief Justice concludes that a mandamus will lie.

As long ago as the year 1693 it was alleged on argument in behalf of the crown, that “it was never yet doubted, but that this court might remove by mandamus, all common nuisances, or anything done to the prejudice of the public.” And on the part of the defendant in that case, it was admitted, that the court of King’s Bench had granted a mandamus to abate a nuisance, without trial; but then, the fact had been made certain, either by matter of record, or by a view, or presentment by a grand jury. So it was in Jacob Hall’s case, who was presented by the jury for a nuisance in the highway; though it was at Charing Cross, in the view of the justices, coming to Westminster Hall. *Rex v. College*, 4 Mod. Rep. (K. B.) 237, 240.

Thus it seems to have been held, that a mandamus might issue where the public interest required an immediate remedy: not merely, when an indictment would lie, but even after the finding of a presentment by the jury.

Mr. Chitty, in his book of General Practice, Vol. I, p. 790, after laying down the general rule, that this writ is only to issue, where the party has no other specific remedy, admits, that “in the case of a clear, public right, if it be important to prevent great and immediate public damages, or inconvenience to many persons, the court should immediately interfere; as in case of a public bridge, or other work being in a very dangerous state, and requiring immediate repair, or support. If there be no doubt respecting the obligation to repair, a mandamus may be issued, although there be another remedy by indictment.” I have no hesitation therefore in saying, that so far as mandamus is objected to on the ground of another remedy existing, I see no reason to withhold the writ.

(After determining that the company was bound to erect a bridge over their canal and to keep the same in repair, and, further, that this duty was clear, the writ of mandamus was granted.)

7. Not granted to compel performance of impossible acts or when useless and unavailing.

PEOPLE EX REL. SUPERVISORS v. FOWLER.

1873. COURT OF APPEALS OF NEW YORK. 10 Sickels (N. Y.) 252.

APPEAL from the order of the General Term, of the supreme court in the second judicial department, reversing an order of Special Term directing that a peremptory mandamus issue commanding defendants, as assessors of the town of Rye, Westchester county, to make oath, in the form prescribed by the statute (§ 8, chap. 176, Laws of 1857), to the assessment roll of said town for the year 1871.

The facts sufficiently appear in the opinion.

ANDREWS, J.—The statute (1 Rev. Stat. 393, § 17) declares that all real and personal estate, liable to taxation, shall be estimated and assessed by the assessors at its full and true value, as they would appraise the same in payment of a just debt due from a solvent debtor. To insure the observance by assessors of this statutory rule of assessment, and to prevent an evasion thereof, they are required to verify the assessment roll, and to make and subscribe an oath, in the form prescribed by law, in which shall be stated, among other things, that, with the exception of those cases in which the value of real estate set down in the roll has been changed by proof produced before them, they have estimated its value “at the sums which a majority of the assessors have decided to be the full and true value thereof, and at which they would appraise the same in payment of a just debt due from a solvent debtor.”

It appeared upon the return of the order to show cause in this case by the affidavit of the defendant Purdy, one of the assessors of the town of Rye, that it had been the custom, for several years, of the assessors of that town, in making the assessment roll, not to enter therein the value of real estate at its full value, or at the true or full value at which the assessors would appraise it in payment of a just debt due from a solvent debtor, but to insert the value at about one-third, or in some cases one-fourth the full and true value, and at one-third or one-fourth the sum at which they would appraise it in payment of a just debt due from a solvent debtor, and that this was the plan or basis upon which the assessment roll of 1871 was made. The affidavit of the defendant Fowler, also one of the assessors, contains substantially the same statements, and the additional one that, in view of the practice of the assessors in other towns, in the county of Westchester no other basis of assessment could be adopted “in justice and fairness to the town of Rye.” There was no contradictions of these affidavits, and the fact

stands unchallenged, upon the statements of the assessors themselves, that, in making their assessment, they deliberately violated the statute and their official oath for the purpose of doing "justice to the town of Rye."

The assessors made and subscribed an oath, annexed to the roll, in which they stated that, in making the assessment roll, they had estimated the value of the real estate therein at a sum which a majority of the assessors had decided was its true and full value, but they omitted to state that the valuations were those "at which they would appraise the same in payment of a just debt due from a solvent debtor." The mandamus was sought to compel them to add the omitted clause to their affidavit. They, in answer, allege that they could not truthfully swear to that statement. This answer is conclusive. Courts do not sit to compel men to take false oaths, and whatever duty the assessors may have omitted, they owe no duty to the public to commit crime, and no public exigency can require it of them. The case is directly within the principle of *Howland v. Eldredge*, 43 N. Y. 457.

It is said by the counsel for the relator that, as the assessors have sworn in the affidavit attached to the roll that they estimated the real estate at what they had decided was its full and true value, they can therefore complete the statement required by the statute. We are not called upon to reconcile the conflicting affidavits of the assessors. Upon the facts now shown it is clear that they did not decide that the valuation of the real estate, set down in the assessment roll, was its true or full value. In making the assessment they intentionally inserted a valuation much less. If they decided at all what the real value was, it was merely to enable them to insert in the roll the proportion of that value which they had agreed upon as the proper basis of assessment. The entry of a sum in the roll as a value, although the assessors agreed to regard it, for the purpose of assessment, as the true value, was not in any proper or legitimate sense, under the circumstances, a decision by them that the sum inserted was the true or full value. The assent of the judgment to the conclusion reached was wanting, which is of the very essence of a judicial determination.

It is sufficient, to dispose of this case, that the facts appear without contradiction, that the basis of the assessment was such that the assessors could not truthfully swear that they had assessed the real estate at a sum "at which they would appraise the same in payment of a just debt due from a solvent debtor."

The order of the General Term should be affirmed.

All concur.

Order affirmed.

STACY v. HAMMOND.

1895. SUPREME COURT OF GEORGIA. 96 Ga. 125, 23 S. E. 77.

ATKINSON, J.—It appears that on July 14, 1894, a petition bearing the names of the requisite number of citizens was presented to the ordinary of Spalding county, asking that an election be ordered, in terms of the general local option law, to determine whether spirituous liquors mentioned in the sixth section of that act should be sold within the limits of that county. For certain reasons, upon the sufficiency of which we are not now called upon to pass, the ordinary declined to order that election. A petition for mandamus was presented to the judge of the superior court, and on the 15th day of August next thereafter, a mandamus *nisi* having in the meantime been granted, the petition came on to be heard. It was demurred to, among other reasons, upon the ground that, even if allowed, the mandamus absolute must prove nugatory and fruitless. This demurrer was sustained, and mandamus absolute denied. The act provides that the election shall be held within 40 days after the reception of the petition. It requires that 4 weeks' notice be given of the time of holding the election. It would, therefore, under the provision of the act, have been impossible to have held the election within 40 days from the time of the reception of the petition by the ordinary, even though the mandamus absolute had been granted. This writ will never be granted when it would be fruitless or nugatory, and for this reason the judgment of the circuit court in refusing a mandamus absolute must be sustained. Let the judgment of the circuit court below be affirmed.

O'BRIEN v. TALLMAN.

1877. SUPREME COURT OF MICHIGAN. 36 Mich. 12.

MARSTON, J.—The action in this case was commenced in justices' court upon a replevin bond. Judgment was rendered in favor of the plaintiff and the cause was then appealed to the circuit court, where a new trial was had upon the merits, and judgment rendered for the defendant. The case comes here on writ of error to the circuit court. A number of questions were raised and discussed, but on account of an inherent defect in plaintiff's case it will be unnecessary to consider them, the plaintiff not being injured by the rulings, if erroneous, as under the facts offered and introduced in evidence, plaintiff was not entitled to recover in this action.

Plaintiff in his declaration alleges, after setting forth the proceedings in the replevin suit, that a judgment was recovered in said cause before the justice against the plaintiff therein and in favor of the defendant for \$90.00 damages and costs of the suit, taxed at \$6.00, upon which judgment and execution was issued and returned unsatisfied. This action is brought to recover the amount of that judgment. It appears in this case that the writ of replevin was issued upon the 18th day of February, 1873, returnable on the 28th; that upon that day the parties appeared, when a motion was made on behalf of the defendant that the suit be dismissed, upon the ground that the affidavit was insufficient, which motion prevailed; when the defendant waived a return of the property, evidence was given as to its value, and defendant moved that judgment should be rendered in his favor for the value as testified to, which the justice refused, but did render judgment for a return of the property, with costs against the plaintiff.

It also appears that a peremptory writ of mandamus was issued out of and under the seal of the circuit court for the county of Van Buren, on the 9th day of September, 1873, directed to the justice by whom such judgment was rendered, commanding him immediately upon the receipt of said writ, "to render and enter a judgment in his docket in due form in favor of the defendant John E. Showerman and against the plaintiff Rhoda Ann Williams, for the value of said property replevied, as proved, and costs of the suit, and that all judgment and entry in said cause inconsistent therewith be vacated, abandoned, and held for naught." In obedience to this writ, the justice made an entry in his docket, vacating, abandoning, and holding for naught all judgments and entries inconsistent with said writ, and did at the same time render judgment against the plaintiff and in favor of the defendant in said replevin suit, for ninety dollars damages and six dollars costs. This is the judgment declared upon by the plaintiff in this case.

We are of the opinion that the so-called judgment rendered in obedience to the mandamus is a nullity, and that the judgment of February 28, 1873, is yet in full force, and was in no way affected by the proceedings under that writ.

Had the justice refused to render a judgment in said cause, in a case proper for a judgment to be rendered, a mandamus might have been issued to compel him to proceed and enter up a judgment. *Taylor v. Tripp*, 15 Mich. 518. The justice, however, did proceed to render a judgment for the return of the property. This judgment may not have been the proper one, but the statute gives the party who considers himself aggrieved thereby the right to remove the cause by *certiorari* or appeal to the circuit court. The statute thus gives him a full and adequate remedy by which

he can protect his interests. This being so, mandamus is not the proper remedy, and we have previously held that mandamus will not lie to review irregularities in the judicial action of an inferior court, where the party injured had another remedy. *Mabley v. Court*, 32 Mich. 190. If the writ of mandamus was the proper remedy in such cases, we might have one of the parties applying to the circuit court for the writ to compel the vacation of a judgment, while the other party would be taking steps to remove the cause to the circuit court upon appeal or *certiorari*. And if the writ should issue and the judgment be vacated, and a new judgment rendered by the justice in obedience thereto, would not the opposite party still have the right to remove the judgment so rendered to the circuit court for trial or review? so that we would have the circuit court reviewing the judgment of a justice rendered in obedience to its own command.

There is still a further objection: the circuit court could not in this manner compel the justice to do an act which the justice of his own motion could not have done. When a judgment is once rendered by a justice he has no further power or control over it except such as may be necessary to enforce it. He has no power to vacate or set aside such judgment or to render a new judgment in such cause, and should he attempt to do so, his action would be *coram non judice* and void.

Judgment must be affirmed with costs.

The other justices concurred.

See also *Bass v. Taft*, 137 U. S. 458, 11 Sup. Ct. 154; *Spiritual Society v. Randolph*, 58 Vt. 192, 2 Atl. Rep. 747; *People v. Bartlett*, 67 Cal. 156, 7 Pac. Rep. 417; *State v. Board of Health*, 49 N. J. L. 349, 8 Atl. 509; *McAlee v. County*, 42 Fed. 665; *State v. Archibald*, 43 Minn. 328, 45 N. W. 606; *Ex parte Shaudies*, 66 Ala. 134; *People v. Monroe Oyer and Terminer*, 20 Wend. (N. Y.) 108; *Universal Church v. Trustees*, 6 O. 446; *State v. Schofield*, 41 Mo. 38; *Roberts v. Smith*, 63 Ga. 213.

PEOPLE v. HAKE.

1876. SUPREME COURT OF ILLINOIS. 81 Ill. 540.

THIS is a petition under chap. 87 of the Rev. Stat. 1874, praying a mandamus against Hake, as Mayor of East St. Louis, and the clerk, to compel them to issue and deliver to the relator a certain certificate for \$210.00, payable out of a special appropriation of \$1,000.00, made by the city for its health department, for the year 1876.

Per curiam.—It appears by the record in this case that the respondent is enjoined in another proceeding from doing precisely

the same thing that is here sought to compel him to do by mandamus, and that such proceeding is now pending for hearing at the next term in the southern division. The adjudication in that case will settle the question attempted to be raised in this, and, on principle announced in *People v. Warfield*, 20 Ill. 159, and *People v. Wiant*, 48 Ill. 263, mandamus will not be awarded.

Mandamus refused.

8. Mandamus does not lie to enforce contractual obligations.

BAILEY v. OVIATT.

1874. SUPREME COURT OF VERMONT. 46 Vt. 627.

Ross J.—This is a petition for a writ of mandamus. The relators are a committee from the senate and house of representatives of 1872, appointed under, and deriving their authority from, the following joint resolution: “Resolved, That a committee of three senators and three members of the house be appointed respectively by the president of the senate and the speaker of the house, to inquire whether or not it is true that in A. D. 1869, or at any time before or since that time, money was paid directly or indirectly by any trustee, manager, receiver, officer, or agent of any railroad, or railroad company, in this state, to any member of either house of the legislature for the purpose of influencing legislation; whether or not it is true, that under any power derived from either branch of the government of this state, any person connected with the afore-said railroads or companies, has practiced frauds or peculations; and, finally, to investigate fully, all and singular the matters above referred to; and said committee to have power to send for persons and papers and to employ counsel to prosecute the investigation to its fullest extent, and to make report to the present session of the legislature; also to inquire whether any member or officer of either house of this general assembly has written or aided in procuring to be published, the articles in the *Boston Traveller*, touching any measures now pending before the legislature; also, whether any member or officer of either house of the general assembly are in the pay and employment of any individuals opposed to the passage of any such measures.” By a subsequent resolution, the committee were authorized to pursue their investigations after the adjournment of the legislature, and to make report to the Governor on or before July 1, 1873.

In pursuing their investigations, the committee employed the defendant to take and report the testimony that should be produced

before them. The defendant entered upon the employment, took the testimony, has transcribed some of it, and has failed to transcribe the residue. It is unnecessary to inquire whether the resolution conferred upon the committee the power to employ the defendant in that capacity. It is sufficient that it did not create the office of reporter for the committee, and appoint, or empower the committee to appoint the defendant or any other person to that office. In taking and reporting the testimony, the defendant was not discharging the duties of any public office. He was acting as the mere servant of the committee, as it were, their hands to take down the words as they fell from the lips of the witnesses, in shorthand, and afterward to transcribe his characters into written language. In the petition, the relators say, "They employed, by their chairman, Henry Oviatt, of Montpelier, in the county of Washington to act as clerk and stenographer, and as such, to take full and accurate notes of the testimony given and introduced before them, and said Henry Oviatt accepted the office, duty, and trust of clerk and stenographer for the committee." The committee could have discharged the defendant from their employment at any time, and he could have withdrawn from such employment at any time. He held no office, the duties of which he could compel the committee to allow him to discharge; nor could he be compelled, longer than he chose, to discharge such duties. While acting as clerk and stenographer for the committee, he was performing a service, discharging the duties of an employment, duties imposed by contract, and nothing more. From the affidavits read on the hearing, which are to be taken as true, inasmuch as the defendant allowed the petition to be defaulted, it appears that the defendant discharged the duties of his employment, to the acceptance of the committee, so far as to take in full, stenographically, all the testimony introduced, to transcribe a considerable portion of it. He has not absolutely refused to make a transcript of the residue of the testimony and deliver it to the committee. By what appear to be false promises, evasions, groundless excuses, if not willful falsehoods, he seems to have done worse than to absolutely refuse. No court would hesitate to command him to discharge his duty, and redeem, at least, one of his promises, if he stood in a position that gave to the court, the legal power to command and enforce its commands. The relators ask this court to command him to transcribe and deliver to them the balance of the testimony taken. Can this court legally issue such a command? By Gen. Stat. ch. 30, § 11, this court is clothed with the power to issue the writ of mandamus "to the furtherance of justice, and the regular execution of the laws." This confers upon this court all the powers to issue such writ that was exercised by the court of King's Bench. "A mandamus is a writ commanding the execution of an act where otherwise justice would be obstructed, or the King's charter neglected, issuing regularly only in those cases relating to the public and the government, and

it is therefore termed a prerogative writ, being grantable only where the public justice of the nation is concerned." *Bac. Abr. Mandamus*, (A). The same author cites a number of cases in which the court of King's Bench refused to issue the writ to compel the performance of a service. From a careful investigation of all the cases to which I have had access, I have not been able to find one in which the writ has been issued to compel the performance of a mere service. While it is of a highly remedial nature, "to the furtherance of justice and the regular execution of the laws," courts having jurisdiction of the writ, can use it only to compel the discharge of duties imposed by law, as distinguished from duties imposed by contract merely. The duty of the defendant was created by his contract with the committee. It is a duty that he owes to the committee as their servant, and not one that he owes to them by reason of any office which he holds, or from having it imposed upon him by law. He is under no obligation to discharge the duty, because he owes it to the public, and the committee have no right to have the duty discharged, because they have a special interest in the discharge as a public duty. It is true that his failure to discharge his contract duty to them, hinders them in the discharge of their public duty, as a committee of investigation, but that does not render his any more a public duty. It simply shows that the committee was very unfortunate in the choice of a servant. Suppose that the defendant, after having contracted to act as clerk and stenographer for the committee, but before entering upon the work, had refused to act in that capacity, would any one claim that this court could compel him to perform those services by the writ of mandamus? We think not. No more can it legally issue the writ to compel him to perform what remains unperformed of those services. "A mandamus lies to deliver up the ensigns of an office, or the papers or records of a public nature to a successor; as a mandamus to deliver the mace and other ensigns of mayoralty to the succeeding mayor, or to an ex-town clerk to deliver to his successor the several books that belong to that office." *Bacon Abr., Mandamus (D), Walter v. Belden*, 24 Vt. 658. The committee have attempted to make the testimony a part of their report. It is somewhat difficult to comprehend how that can be a part of their report which they have never had in their possession to deliver to the governor. Their report, when made, will be of a public nature, and treat of matters which pertain to the public welfare. If the report had been completed, and he was detaining it from them, authorities are not wanting to show that he could be compelled by mandamus to deliver it to the relator. If the respondent had taken the testimony in the discharge of a public duty, doubtless the court could compel him to transcribe his stenographic characters into written language, and to deliver the transcript to the committee. His stenographic report of the testimony is his own private property, and though taken to be tran-

scribed for the committee is not claimed to belong to the committee. He does what is tantamount to a refusal to transcribe his stenographic notes, and to deliver the transcript to the committee. He has no part of their report in his possession. They ask to have him compelled to transcribe his minutes, and deliver them the transcript, that they may make the transcript a part of their report. It is not the delivery of a part of their report, but the performance of his contract duty, that they ask this court to compel. We have not been able to find any adjudged case, or principle of law, which will authorize the issuing of the writ. Its issue in effect would be the compelling of the specific performance of a personal contract for service, for which we do not know of any authority in law. Compensation in the nature of damages, has always been held to be the appropriate and an adequate remedy for the breach of a contract, for the performance of a simple service. Where a party has an adequate remedy, or a remedy which the law deems adequate, courts will not, ordinarily, issue the writ of mandamus.

The petition of the relators is dismissed.

9. Petitioner must show himself without fault.

COMMONWEALTH v. HENRY.

1865. SUPREME COURT OF PENNSYLVANIA. 49 Penn. 530.

AGNEW, J.—The questions in this case arise upon the return of Alexander Henry, mayor of Philadelphia, to a writ of alternative mandamus issued out of this court. The purpose of the writ is to compel the mayor to execute a release to the relators for certain lands of the Girard estates in Schuylkill county. He refuses to do so on two grounds: 1st. That the ordinance of December 26th, 1861, vests in him a sound discretion. 2d. That the relators have been guilty of corrupt practices in procuring themselves to be nominated as lessees.

The language of the ordinance as recited in the petition is this: "The mayor of Philadelphia be and he is hereby authorized to execute a lease with Jas. C. Connor, or such other persons as may be accepted from time to time, by the superintendent of the Girard estates, under the supervision of the committee on Girard estates, of the coal lands in Schuylkill county, vested in the city of Philadelphia by the last will of Stephen Girard; in the form prepared by the city solicitor, and approved by the committee on Girard estates, and reported to councils December 5th, 1861."

These are acts of legislation where "may" will be interpreted to mean "shall," or where the language of mere authority will be held to be a command. The letter of the law is violated to preserve its spirit and intent.

In the mode established by the ordinance, we find the mayor playing no subordinate part. The right of granting the lease is not vested finally in any other person or body. It is he that does the last and important act which concludes the city, and this he does in a prescribed and settled form adopted by the councils. But, as preliminary to the exercise of this authority, and as a check on hasty or ill-advised leasing, the applicant is to be accepted by the superintendent, under the supervision of the committee on the Girard estates. This accords with the nature and importance of the subject, and secures full information upon distant properties and the persons to become tenants, while the final responsibility is cast upon the single head and chief executive of the corporation. The superintendent receives the application and accepts the tenant under the supervision of the committee, and the mayor concludes the transaction by formally executing and delivering the lease. Care and deliberation are thus secured, and they are shared in by the head of the corporation. It is only by distorting a mere authority into a command the mayor is made to perform a purely ministerial duty. It is at variance with the language of the ordinance and the character and powers of the officer selected as the final depository of the power. There is not a word in it devolving the whole duty of leasing upon the superintendent and his supervising committee. Now, clearly, when the ordinance said he was authorized, it did not mean he was commanded, when upon him fell the important duty of concluding the lease; and if, before completion, he should discover strong reasons why the bargain should not be consummated, certainly his official character and duty would require him to pause, and not be compelled forward to the execution of the paper like a mere automaton.

It is not to be forgotten that the ordinance which we are considering, and its subject matter, have relation to the execution of a private trust reposed in the city by the will of Mr. Girard, and not to the execution of merely public duties, and that the interests of the trust are, therefore, to be protected by the court.

The facts of this case furnish also an ample reason for the interpretation now given to the ordinance. We should be glad, for the honor of those concerned, to discredit the disgraceful transactions stated in the paper-book. But the return of the highest officer of the city, an upright citizen, as there is every reason to suppose, under his solemn oath, founded upon the report of a highly respectable committee, and upon the testimony accompanying it, is a source of information we cannot reject in this proceeding. The matters thus presented, proceeding not only from the immediate parties, but from

members of the councils also, are shocking to the moral sense of good men. A committee of three members of the councils was appointed to investigate certain charges against the resident agent in Schuylkill county, and also to report upon the propriety of making certain leases. The lease claimed by the relators is one that was recommended by the committee. Strange to say, the conduct of this committee became the subject of investigation, and of the report of the committee of five before referred to.

The report of the final committee of investigation contained the following language: "Messrs. Vandyke and Wadleigh were applicants for the most valuable of them (the coal lands). We append their testimony, which will fully explain the conclusions to which we have come in regard to these gentlemen. They both admit that they offered \$1,000.00 to the resident agent of the city if they should succeed in obtaining the lease. They endeavor to defend this offer by refined distinctions, and, rejecting Mr. Kearcher's mode of stating what occurred with some apparent feeling, they adopt another, which is perhaps stronger against them. We cannot doubt the impression which their own account of the matter will have upon all correct and right-minded men."

After exonerating Mr. Kearcher, the agent, the committee conclude by recommending that the resolutions granting leases to Messrs. Vandyke and Wadleigh be vacated. The resolutions here referred to appear by the paper-book to be those of the committee on the Girard estate, not of the councils.

In reference to the conduct of the committee of three by whom the lease to the relators was recommended, the report, after referring to matters quite unfavorable to two of the members, proceeds: "The evidence in regard to this latter gentleman is so conclusive, and his failure to attend, or offer to deny or rebut it, confirm it so decidedly that we deem it unnecessary to make comments upon it. In boldly and unshrinkingly pressing his own corrupt demands he did not hesitate to bring the whole of the committee on Girard estates under suspicion. Such conduct is a disgrace to the councils, and should meet with prompt and immediate punishment."

Without further comment upon these unwarrantable transactions, it is sufficient to say, if ever a public officer was justified in declining to consummate a contract, obtained by what appeared to him to be corrupt practices, and therefore presumptively injurious to the public, it is this case.

But, were the ordinance imperative in its terms, there is still a ground that requires a peremptory mandamus to be refused. No court will knowingly suffer itself to be the instrument to carry into execution a rotten and unsound bargain, especially where it affects an important private trust. It is said this is not a proceeding in equity, but that mandamus is a writ at law, and that therefore the court cannot refuse its aid. This is true where the relator establishes

his title to the writ. But it is settled that, to found the application, the law requires the applicant to establish a specific legal right, as well as the want of a specific legal remedy; and also that the writ will be granted only in extraordinary cases to prevent a failure of justice. *James v. Commissioners*, 1 Harris (Penn.) 75; *Commonwealth v. Commissioners*, 2 Penn. 518; *Heffner v. Commonwealth*, 4 Cas. (Penn.) 112. Now we have before us no case of a specific and fixed legal right, but an inchoate contract which can be perfected only by the very remedy the relators are seeking through the mandamus. The title, therefore, of the relators, to have a perfect lease, depends upon the fairness of their conduct in procuring themselves to be presented as proper parties to receive it. Their title to have the mandamus is the same they must present to have the lease; for, without a title to have the lease, they have no title to the writ. It is just at this point they fail. The evidence shows a proceeding to corrupt the channel through which their application must come, and a corrupt proceeding by the sub-committee by whom it was recommended. The application, therefore, appears before us with such a taint we are justified in refusing to exercise the high and extraordinary powers invoked by this writ.

Writ refused. Judgment upon demurrer for defendant.

THOMPSON, J., dissented, and filed a dissenting opinion.

WOODWARD, C. J., concurred.

CRITTENDEN v. REILLY.

1893. SUPREME COURT OF MICHIGAN. 97 Mich. 637, 57 N. W. 192.

PETITION by Chas. T. Crittenden as guardian, etc., for mandamus to compel Cornelius J. Reilly, presiding as circuit judge of Macomb county, to vacate an order dismissing an appeal from the probate court. Denied.

The appeal was from an order of the probate court admitting a will to probate. After the dismissal of the appeal relator suffered more than a year to expire, which is the time limited by 3 How. Stat. 8686, for bringing certiorari.

Per curiam: The relator had a remedy by certiorari which has been lost by lapse of time, and a writ of mandamus will not be granted to extend the time beyond that limited for bringing certiorari.

Mandamus will not issue.

See also *State v. Buhler*, 90 Mo. 560, 3 S. W. 68; *Ansonia v. Studley*, 67 Conn. 170, 34 Atl. 1030; *Fishel v. Circuit Judge*, 97 Mich. 609, 57 N. W. 188; *Reynolds v. Crook*, 95 Ala. 570, 11 So. Rep. 412. Compare *State v. Bates*, 38 S. Car., 17 S. E. 28.

Laches is ordinarily held to be good ground for refusing to issue *Mandamus*. *Rice v. Bd. of Canvassers*, 50 Kas. 149, 32 Pac. 134; *State v. Finley*, 74 Mo. App. 213; *People v. Syracuse*, 78 N. Y. 56; *State v. Cappeller*, 39 Ohio St. 455; *Taylor v. Gillette*, 52 Conn. 216; *State v. Jennings*, 48 Wis. 549, 4 N. W. 641.

10. Necessity of demand and refusal.

SHIRLEY v. TRUSTEES.

1892. SUPREME COURT OF CALIFORNIA. Cal. (Unreported) 31 Pac. Rep. 365.

BELCHER, C.—This is an appeal by the defendants from a judgment awarding the plaintiff a peremptory writ of mandate, and the case is brought here for review on the judgment roll. The court found the facts of the case to be in substance as follows: In July, 1890, the defendants were the duly elected, qualified and acting trustees, and constituted the trustees of Cottonwood School District in San Benito county. The plaintiff was duly qualified school teacher, and on July 1, 1890, was employed by the defendants to teach the pupils of the Cottonwood school for the term of four months, commencing on the 14th day of that month. She was to receive and agreed to accept, for her services, \$60.00 per month, payable monthly by orders drawn by the board on the county superintendent of schools. At the time mentioned she entered upon the performance of her duties as such teacher, and continued to teach the school until August 23d, a period of six weeks, when the defendants, as such board of trustees, wrongfully and without cause discharged and dismissed her from the school, and prevented her thereafter from teaching the school and completing her part of the contract. She was ready, willing, able, and competent to teach the school and complete her part of the contract, and repeatedly offered to so do, but the defendants, as such board of trustees, prohibited and prevented her from occupying the school-house and teaching the school after August 23rd. On August 23rd, a majority of the board proposed to her that she teach the school two weeks longer, if at the end of the two weeks she would resign her place as teacher. She assented to this proposition, but demanded as a condition of her resignation that she be paid her salary for the full term of four months. The board refused to pay the full amount, but drew an order in her favor for \$90.00, the sum being in full payment of the

time she had already taught. "No demand was made by plaintiff on defendants after the expiration of said four months, nor was any demand for the full term's salary made by her, other than as a condition for her resignation, as above set forth, and such demand was made on August 23rd, 1890." "Said discharge of plaintiff was for the alleged cause of incompetency as a teacher, and for cruel and unusual punishment of a pupil, but plaintiff was all during said time competent as a teacher, and performed and fulfilled her duties properly as such, and did not punish said child either in a cruel or unusual manner, nor for any purpose except for just cause, and to a moderate extent, but said board of trustees in discharging plaintiff acted under the honest belief that plaintiff had punished the child excessively, and in a cruel and unusual manner." The court further found that the sum of \$150.00 was due the plaintiff, and unpaid, for the balance of her salary under her contract, and as conclusions of law: "That plaintiff, by wrongful acts of defendant in ignoring the contract, and expelling plaintiff from said school, was exonerated from making formal demand for the issuance of the order on the superintendent of schools. That plaintiff is entitled to the peremptory writ of mandate, compelling defendants, as said board of trustees, to issue to plaintiff the order on the said superintendent of schools of San Benito county for the sum of \$150.00, but without costs." Judgment was accordingly so entered. It is alleged in the complaint, and not denied, that, notwithstanding the action of the trustees in discharging her, plaintiff entered another house within the school district, and convenient for the pupils therein, and taught the pupils of the district continuously from the time of her discharge up to October 31st, making four full month's service as a teacher, and thus fulfilling her contract. It is also alleged "that, at the expiration of those four months, plaintiff demanded of and from the defendants, the same board, that they issue to her the order for the amount due to her upon the county superintendent for payment thereof, but said board refused, and still refuses, to issue said order, or to pay the same, or any part thereof." And it is said in the brief filed on behalf of the respondent that such a demand was in fact made. The allegation was, however, denied by the answer, and the finding on it cannot therefore be controverted here. Upon the facts shown, it is entirely clear that respondent was entitled to full payment for her four months' service; for, as said in *Webster v. Wade*, 19 Cal. 291, "the law is well settled that, where a contract is made for a fixed period, if the employer discharge the servant before the termination, without good cause, he is still liable, and the servant may recover the stipulated wages." The appellants, however, contend—and this is the only point made for the reversal of the judgment—that the respondent was not entitled to the relief demanded, for the reason that no express demand was made upon them to perform the act sought to be enforced before the proceedings were in-

stituted. This point seems to be well taken. In *People v. Romero*, 18 Cal. 90, the court, by FIELD, C. J., said: "To authorize a mandamus it must appear not only that the performance of the act, to enforce which the writ is asked, is a duty resulting from the office, duty, trust or station of the party to whom the writ is to be directed, but that the performance has been requested and refused." And the learned justice then quoted with approval from *Tapping Mand.*, as follows: "*It is an imperative rule of the law of mandamus that, previously to the making of the application to the court for a writ to command the performance of any particular act, an express and distinct demand or request to perform it must have been made by the prosecutor to the defendant, who must have refused to comply with such command, either in direct terms, or by conduct from which a refusal can be conclusively implied; it being due to the defendant to have the option of either doing or refusing to do, that which is required of him, before an application can be made to the court for the purpose of compelling him.*" This language was again quoted with approval in *Oroville etc. R. Co. v. County*, 37 Cal. 362, and the same rule was declared in *Price v. Co.*, 56 Cal. 434. The rule thus declared seems to be general, and to apply to all cases, except when the thing to be done is a duty to the public in which the petitioner has no special interest. "In such case," it has been said, "the law itself stands in lieu of a demand, and the omission to perform the required duty, in place of a refusal." High Ex. Leg. Rem., § 13. The court below based its conclusion, as we have seen, upon the fact "that plaintiff, by the wrongful acts of defendants in ignoring the contract, and expelling plaintiff from said school, was exonerated from making formal demand." But we do not think this conclusion can be sustained. We advise that the judgment be reversed, and the cause remanded for a new trial.

We concur: HAYNES, C.; TEMPLE, C.

Per curiam: For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded for a new trial.

UNITED STATES EX REL. INS. CO. v. AUDITORS.

1881. U. S. CIRCUIT COURT, NORTH. DIST. ILLINOIS.

8 Fed. Rep. 473.

DRUMMOND, D. J.—This is an application by the relator, after due notice, for a peremptory mandamus against the defendants to take the necessary steps under the law to assess a tax for the payment of various judgments which have been rendered in this court against the town of Brooklyn, Lee county.

It appears by the petition that these judgments were recovered on interest coupons on bonds issued by the town of Brooklyn to the Chicago & Rock River R. R. Co., in pursuance of law, and in accordance with a vote of the electors in the town. It also appears that the main question involved in these various judgments has in one of the cases been decided by the Supreme Court of the U. S., affirming the validity of the judgment of this court. *Brooklyn v. Ins. Co.*, 99 U. S. 362.

It is also alleged and admitted that the town has no property or effects which could be reached by execution on the judgments. It is also stated that the judgments are in full force, and in no part satisfied, which statement has not been denied by the answer which has been put in. It is averred that the defendants have neglected and refused to make provision for the payment of the interest on the bonds, and that a formal demand for the payment of the several judgments would be unavailing. This is not with the necessary explicitness denied by the answer. There can be no doubt that these judgments are a town charge, within the meaning of the statute of the state upon the subject. *Lower v. United States*, 91 U. S. 536.

The board of auditors has answered the petition, and states merely that it is not advised or informed whether the town has neglected or refused to pay the judgment, or threatened that it will not pay the same, and so denies the truth of the same. The main defense set forth to the answer in the petition is that a demand has not been made by the relator, or by anyone on his behalf for the payment of these judgments, prior to the time of the filing of the petition in this case. The judgments have been offered in evidence, and there is no controversy about the existence of the judgments and their non-payment. The town clerk has demurred to the petition, and the petition, answer and demurrer have been argued together by the counsel and considered by the court, and the question is, whether, upon what has been regarded as the conceded facts of the case, the relator is entitled to a peremptory mandamus, requiring the board of auditors and the clerk to proceed in conformity with law. The law requires, for the purpose of meeting a charge against the town, that the board of auditors and clerk should duly proceed, in the manner pointed out by the statute, to cause the property of the town to be assessed for its payment. *Rev. Stat. Ill. (Cothran's Edition) 1507, 1508, "Township Organization," §§ 115, 118, 120, 121, 124.*

The two facts which must be considered as established by the pleadings in this case, and by the evidence, are that these judgments were recovered as stated in the petition; that they have not been paid either in whole or in part; and that no steps have been taken by the proper authorities in the town to cause their payment by the imposition of a tax upon the property of the town. One of the judgments was rendered more than five years since; one more than two years; and the others during the last year. Although it was the duty of

the defendants or the board of auditors and the clerk, under the law, to adopt measures long ago to cause the payment of these judgments, rendered in March, 1876, in June, 1879, and in March, 1880, yet nothing has ever been done, and the only serious question, as I view the subject, is, whether it is necessary that a demand should be made in form by the relator, upon the authorities of the town, for their payment, or to proceed in the manner pointed out by law to cause the payment of these judgments. And I think it was not. These judgments were all recovered after due service of process upon the authorities of the town, and after ample opportunity for defense. One of them involving, as I understand, the principle of all the cases, was finally decided by the Supreme Court of the U. S. adversely to the defense set up by the town.

It must be presumed, therefore, that these defendants knew of the existence of these various judgments, and that it was their duty to proceed in conformity with the law, and that they have failed to do so. It would seem, therefore, to be a vain act to demand that they should proceed under the law, when they have done nothing for a series of years. The only controversy about any of the judgments is that rendered in December last. But, while it is true that a court will not generally issue a mandamus to compel the performance of an act which it is merely anticipated the defendant will not perform, still, if the defendant has shown by his conduct that he does not intend to perform the act, and that fact is apparent to the court, it would be a work of supererogation to require that a demand should be made for its performance. Here the only effect of issuing the writ of mandamus is to require the authorities of the town to do what by law they are obliged to do. The board of town auditors and the clerk are each a part of the machinery, so to speak, by which the judgments are to be satisfied. The clerk is himself a member of the board of auditors. And, therefore, it seems to me to be proper and reasonable, and nothing more than the relator has a right to claim of the court, that an order should be issued requiring them to do what the law says, in such a case as this, they must do.

According to my view of the case there is really no material fact upon which it would be necessary to take the verdict of a jury. The judgment of this court must, therefore, be for the relator, both on the answer of the board of auditors and the demurrer of the clerk.

The writ will accordingly be directed to issue.

Compare *Attorney General v. Boston*, 123 Mass. 460.

Although there appears to be no small amount of conflict between the cases on this point, the rule laid down by the weight of authority is that, where general public interests are involved, no demand is necessary, the law itself serving as a continual demand; but where merely private rights are affected, a precedent demand and refusal must be shown.

See *Oroville, etc., R. Co. v. County*, 37 Cal. 354; *City of Cairo v. Everett*, 107 Ill. 75; *Lake Erie, etc., R. Co. v. State*, 139 Ind. 158, 38 N. E. 596; *Dobbs*

v. Stauffer, 24 Kan. 127; Chicago, etc., R. Co. v. Commissioners, 49 Kan. 399, 30 Pac. 456; Swarthout v. McKnight, 99 Mich. 347, 58 N. W. 315; State *ex rel.* v. Slavons, 75 Mo. 508; State v. Eberhardt, 14 Neb.; 201, 15 N. W. 320; People v. Albany Hospital, 11 Abb. Prac. N. S. (N. Y.) 4; State v. Lehre, 7 Rich. Law (S. Car.) 234; State v. Racine, 22 Wis. 258.

"The law does not require a useless thing. It points out the whole duty, with the time and place. This is equivalent to a demand. An omission, or a neglect of that duty, and still more, a performance attempted, but done in a manner which that law says is not a performance, is considered equivalent to a refusal." Woodward, J., in State *ex rel.* v. Bailey, 7 Iowa 390.

II. Mandamus will not lie to control discretionary acts.

MARCUM v. BALLOT COMMISSIONERS.

1896. SUPREME COURT OF APPEALS OF WEST VIRGINIA
42 W. Va. 263, 26 S. E. 281.

PETITION by W. W. Marcum for mandamus against the ballot commissioners of Lincoln, Logan, Mingo and Wayne counties.

BRANNON, J.—A question presents itself, which, I confess, has greatly perplexed me, requiring close thought and nice discrimination for its solution. Does mandamus lie in this case? Until our present election law, called the "Australian Ballot", courts did not know political parties as such. They had no legal status as such in legal contests except in Congress and other political bodies; but under the new election law they have distinctive legal existence whenever questions arising under it come before the courts. Two certificates of nomination for judge of the eighth circuit, emanating from two conventions, each claiming to be the true Democratic nominating convention, were presented to the ballot commissioners of Wayne county, each asking a place on the official ballot, in exclusion of the other. The commissioners were bound to decide which should go on the ballots as the representative nominee of the party. They determined in favor of one. The plaintiff seeks to have this court compel the ballot commissioners to place him on the ballots, thus reversing the action of the ballot commissioners. It is said this cannot be done by mandamus, because the decision by the board of ballot commissioners between the competing nominations involved discretion—involved a decision on facts, a quasi-judicial function—and that mandamus does not lie; and that recourse must be had to a writ to review this action—an appellate process—and that this writ is certiorari.

I admit the doctrine laid down in State v. County, 33 W. Va. 589,

11 S. E. 72, that *mandamus will not lie to control the exercise of discretion of any court, board or officer, when the act complained of is either judicial or quasi-judicial in its nature; that the inferior tribunal may be compelled to act in such a case if it unreasonably neglects or refuses to do so, but, if it does act, the propriety of its action, however erroneous, cannot be questioned or controlled by mandamus*,—followed in *Miller v. County*, 34 W. Va. 285, 12 S. E. 702, and *State v. Herrald*, 36 W. Va. 721, 15 S. E. 974. But it is equally well settled that, if the act to be performed is not one of legal discretion—that is, judicial in its nature—but is merely ministerial in its nature, *mandamus will lie*. *Board v. Mintburn*, 4 W. Va. 300; *Doolittle v. County*, 28 W. Va. 158; full note, *Dane v. Derby*, 89 Am. Dec. 732. It turns, then, on the character of the act. The board of ballot commissioners is not a court, but a merely ministerial body. But is its function of admitting the names of nominees to a place on the official election ballots in nature one of discretion, judicial in its nature, or merely ministerial?

A ministerial act is one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to his own judgment upon the propriety of the act being done. *Merrill Mand.*, § 30; *Flourney v. City*, 79 Am. Dec. 468, and note; *Security Co. v. Fyler* (Conn.), 22 Atl. 494. Chapter 3, Code 1891, provides how nominations for public office shall be made and certified to be put on the ballots, and, in section 33, says that it shall be the duty of the ballot commissioners to provide ballots for every election, “and cause to be printed on the ballots the names of every candidate whose name has been certified to or filed with the clerk of the circuit court in the manner provided in this chapter.” Now, I confidently assert that, when a name of a candidate for office so certified comes before this board, it is its bounden duty to put it on the ballot, and that this duty is ministerial, because the board has no discretion as to putting it on. Ministerial is the nature of the duty of the board when the certificate of but one nomination is before it. But, when a second certificate of nomination comes before the board, does it at once change the nature of the duty from what it was before, simply ministerial, into one of judicial nature? Here the question is close and difficult. Notice that the above definition of a ministerial act says it is ministerial when the officer or the tribunal has no discretion as to the propriety or impropriety of doing the act, but must do it; that is, when he has no power to say whether he will or will not do the act, it is ministerial; but when he has power or discretion to do or not do the act, as his judgment on the facts directs him, the act is judicial in its nature, not ministerial. *Merrill Mand.*, §§ 30-33. Clearly, this board had no discretion to say it would put no name on the ballot, and, therefore, the general nature of its function was ministerial. But this does not dispose of our trouble, for, though the general nature

of making up election ballots by commissioners be ministerial, yet it does not follow that mandamus inevitably lies; for "it is not the office of the writ to control discretion, even in the performance of ministerial duties," says Spell. Mand., § 1395. If, to discharge that ministerial duty, it becomes necessary for the tribunal to decide on law and facts between contesting claims or rights, it becomes judicial in its nature. When the two contestant nominees were both before the board, the matter became a *lis*, a controversy between two parties upon their respective rights, which called on the board to investigate facts, and upon them to say which, in the eye of the law of the election, was entitled to the Democratic place on the ballot. This was then a judicial question, called quasi-judicial when the matter is before an officer, or a tribunal—not a court; and such a question cannot be made the basis of a mandamus at common law.

As seen above, the definition of a ministerial act says it is one that must be done, without any right on the part of the officer or tribunal called upon to perform it to say whether it ought or ought not to be done. Then, what act is that in this case? To solve this case, we must know what act it is on the part of the board about which it must have no discretion to do or not to do it, which will justify the mandamus. Is it the act of the board in putting some name for judge on the Democratic ticket, or is it the act of saying which is the true Democratic nominee, between Marcum and Harvey—in other words, the act of putting or not putting Marcum's name on it, that being the particular act sought to be enforced by the mandamus? If it were the former, mandamus would lie, because the general nature of the duty of putting nominees on a ticket is ministerial; but, obviously, the particular thing which the mandamus seeks to have done is the insertion of Marcum's name on the ticket, and, as the board exercised discretion as to that, because called upon to decide which of the two nominations was the true one, entitled to a place on the ticket, that act is quasi-judicial, and mandamus could not enforce it under the common law of mandamus. I can see that it may be said that the act of deciding between the two nominations is what is known in the law of mandamus as the "preliminary question," and that, though the decision of such a "preliminary question" involve matters judicial in their character, that does not exclude the use of the writ, because its decision is a mere incident, leading up to the mere function or act, that of making out the ballots, as it must put some name on, and, to do so, must inevitably decide which of these names it will recognize; and it is the main or ultimate act—the putting a name on—which gives cast to the act.

It is true that, in law, the character of a purely "preliminary question," though it be judicial, does not test the right to use the writ of mandamus. Merrill Mand., § 44, says: "It often happens that a ministerial duty exists which may be enforced by mandamus provided certain facts exist. It becomes important to decide whether

the determination as to the existence of these facts is a judicial or a ministerial one. Hardly a case can be imagined, when a public officer or tribunal is required to take action upon the happening of an event or the existence of a certain condition of things, wherein there is not some discretion to be used as to whether the event has happened, or the condition of things has occurred. Any board or tribunal must determine whether the proper parties are before it, and whether the facts calling for its action exist. If such determination is judicial, and is adverse to taking any action, such officer or board cannot be called on to do an act which it is his duty to do only in case the facts are different from such conclusion, because no judicial determination can be reviewed or overthrown in mandamus proceedings. If it should be held that in all cases the determination of such preliminary questions call for the exercise of judicial discretion, the writ of mandamus, as has often been said, might as well be expunged from the remedial code. If such a determination is not an exercise of judicial discretion, then the courts can review such determination, and, finding the facts to justify the demand, can order the performance of the ministerial act, which is a duty under these circumstances." Just here I note that this doctrine as to the decision on a "preliminary question," not rendering an act in nature ministerial judicial, is asserted by Judge White, in *Commissioners v. County*, 2 Va. Cas. 9.

Now, apply this law touching a preliminary question in this case. What is that preliminary question in this case to which that law applies? It was whether there was before the ballot commissioners a certificate of nomination in the form and with the signatures required by law; for, if there was, the event had occurred, or the condition of things existed, giving them jurisdiction to act. The decision of whether it was in proper form, and signed by the proper parties, was the preliminary question, just as the question whether a deed presented for record is properly authenticated is a preliminary question to be decided by the clerk, or whether a surveyor's report of land sold for taxes is in proper shape, as shown in the cases of *Dawson v. Thurston*, 2 Hen. & M. (Va.) 132, and *Manns v. Givens*, 7 Leigh (Va.) 689, and *Delaney v. Goddin*, 12 Gratt. (Va.) 266. In deciding on the certificate questions of law, in a greater or less degree, will have to be decided; but they are only on a preliminary question. But, having decided this preliminary question as to one certificate, the board finds a second proper on its face. What then? Another question springs up: Which is the one entitled to appear on the Democratic ticket? And it is one that must be decided on facts outside the certificate. The question addressed to the board was: Shall Marcum's name go on the ticket, or Harvey's? In the decision of this question the board had right of judgment, because it must put one name on, not both, and that judgment was the result of fact and law. Marcum's mandamus seeks to put his name

on the ticket, and that is just the act about doing or not doing which the board necessarily had discretion to exercise, and it is judicial in character, and mandamus does not lie unless the new statute gives it.

I call attention to the fact, as stated by Judge Green in *Doolittle v. Court*, 28 W. Va. 158, that the old Virginia cases are not so rigid against mandamus in the application of the rule that it lies only in matters ministerial, as most other states, as is seen from the case he cites. And I call attention to the case of *Dew v. Judges*, 3 Hen. & M. (Va.) 1, holding mandamus to be a proper remedy to compel a court of record to reverse its action in appointing a clerk in room of another, and restoring that other to his office, which would seem to be a judicial act. Also, *Lewis v. Whittle*, 77 Va., 415. Judge Green said in the *Doolittle* case that, in deciding on the question whether a duty is ministerial, our courts should be governed largely by the spirit of the decisions found in Virginia. Judge Green also said it seemed to him that it was the general nature of the main act to be performed being ministerial that tested whether the writ lies, under the Virginia cases, and, the act of putting a name on the ballot being ministerial, we might, under the Virginia cases, with force hold that, without the aid of a statute, it lies in this case; but, as Judge Green said in the *Doolittle* case, the Virginia rule needed modification, and, as the principle is almost universal elsewhere, forbidding mandamus except in purely ministerial matters, and as this court has often said that this is the true rule, I come to the conclusion that, without statute aid, mandamus does not lie in this case. *Board v. Mintburn*, 4 W. Va. 300; *State v. Court*, 33 W. Va. 589, 11 S. E. 72; *State v. Herrald*, 36 W. Va., 721, 15 S. E. 974; *Miller v. Court*, 34 W. Va. 285, 12 S. E. 702.

I now turn to another feature in the case, arising under the statute. § 89, ch. 3, Code 1891, provides that any officer resting under any duty under that charter might be compelled to perform it by mandamus from the circuit court, and, to promote early decision, dispensed with the usual preliminary rule and commanded a speedy hearing. That was not, in the opinion of the legislature, sufficiently adequate in its remedial provisions, for in 1893 (Acts of 1893, ch. 25) it greatly enlarged that section, by providing not only that officers under it should be compelled to perform their duty by mandamus from the circuit court, but gave a writ from the supreme court to compel any officer to "do and perform legally any duty herein required of him." It requires the supreme court to convene not later than ten days from the date of the writ to hear it, giving it precedence over other business, and requiring it to be determined within five days. Was it intended to give mandamus only as limited by the common law before this statute—that is, where the action was ministerial only? If so, why the need of this provision where the common law already gave it that scope? Was not something more designed? Did not the legislature reflect that

speedy decision was essential in these matters? The statute shows this in the features above spoken of. May it not be plausibly said that it intended to enlarge the efficacy of the writ of mandamus by adding it to certiorari as a cumulative remedy, because more speedy? In the emergencies arising in election matters, as, for instance, in this very matter of making up the ballots, it would not do to wait upon the slow certiorari in the circuit court, and then a writ of error in this court. The day of election would be past before judgment final. Application to the court of appeals by certiorari could not be given because this court has no original jurisdiction in certiorari as it has in mandamus; and hence recourse was given to mandamus for the purpose of trying all questions and matters, if in nature reviewable, pertinent to the subject, treating all duties of officers under this act as ministerial for this purpose, giving the writ of mandamus in such instances as cases *sui generis*. And note that section 89 declares generally that "any officer or person upon whom any duty is devolved by this chapter may be compelled to perform the same by writ of mandamus," not using the adverb "legally"; but, in giving the writ from the supreme court, it grants it to "compel any officer herein to do and perform legally any duty herein required of him." Why use the word "legally"? The power to compel performance is given in general words in the opening of the section, but later in the section it grows more specific by using the word "legally", thus using it sedately. We must give every word a meaning, especially as the lawmaker grew more emphatic or precise by that word. It is an implication quite strong in connection with other features that the officer should be compelled to perform all duties, of every cast, ministerial or judicial, according to law. It seems to me the legislature intended to use, for the sake of speedy final determination in the court of last resort, the only writ available under the circumstances, mandamus, as a writ of review, to operate as a writ of certiorari; taking cognizance of all the questions arising in the case, if the matter be one in nature at all reviewable in certiorari. The legislature was afraid to risk certiorari in such cases of emergency. If we give the statute any other construction it would leave parties in many cases, in grave matters, without relief.

I must be frank to say that in this hastily prepared opinion I have not made a case free from all doubt in my own mind, but it seems better to me than the contrary conclusion. And there is this further reflection to give better satisfaction than a contrary conclusion, and that is that, if Marcum has any right that has been denied, we ought not to throw his cause out of court merely because of mischoice of remedy, unless such mischoice be clear. It is always a hard case to deny relief merely because of mischoice of remedy, when the party would have been entertained had he chosen another form of remedy. Here a dismissal of the writ would be a denial of all relief to which

he may be entitled, by reason of the nearness of the time when ballots must be printed and the election held.

Question has been raised whether the action of ballot commissioner is reviewable at all in any mode. If not, then the most flagrant innocent mistakes and wrongs of intent by an inferior tribunal, hurtful not merely to citizens' rights as candidates, but to the public, and defeating the will of political parties might exist, and there would be no redress. This court has held supervisors and county courts acting as canvassers in election matters, in several cases, as subject to review; and why should not the action of ballot commissioners be also? Suppose there were no review, then in Cabell county one candidate would be a party's candidate for judge or Congress or the Senate, in Wayne another, in Logan another. But, under the construction of the statute above given, the legislature has made their action the subject of review.

Another question is presented important to decide. There were certain irregularities in the magisterial convention sending delegates to the county convention of Cabell county, and certain irregularities in the county convention which sent two competing sets of delegates to the circuit convention. We are asked to look back as far as, not only the county convention, but the magisterial district convention, and say which set of delegates was the proper delegation representing the democracy of Cabell county. But we cannot do so—cannot go behind the circuit convention. That Convention, like the two branches of the legislature of the state, and Congress, like all deliberative bodies having power to organize, is the judge of the election, qualification, and return of its own members. If we go back of the circuit convention, how far shall we go? What shall limit our inquiry? Must we overlook every convention or primary election to say whether its members were old enough or of the politics to entitle them to participate? There must be a limit of reason to our powers. That is the convention whose nominations are in question before us. To hold otherwise would be for this court to assume power to review the organization of political conventions, practically to organize them.

Coming later to a decision of the case on its facts, without detailing them, we find that a Democratic nominating convention for said circuit assembled, but owing to controversy, dissention and disturbance, split in two sections, which organized in two separate bodies, each claiming to be the true convention. Without elaborating this branch of the case, it is enough to say that the refusal of the ballot commissioners to put a candidate's name on the ballot is to be taken as right until shown to be erroneous. To warrant in reversing their action we must see that the convention making the nomination is the convention authorized to speak the will of the party it represents, and the case must be made clear enough to say

that a given one is that convention. Two clashing conventions may be so circumstanced as to warrant the conclusion that neither is authorized to speak for the party. We hold that neither of these conventions was authorized. The law is that the writ of mandamus "will not lie unless the relator shows a clear legal right to have the thing done which he asks for. If the right be doubtful, the writ will not issue." Merrill Mand., § 56. The plaintiff has not shown such a clear right, and we therefore refuse the peremptory mandamus.

ENGLISH, J. (dissenting).—I cannot concur in the opinion expressed by Judge Brannon in the foregoing opinion, for the following reasons: As I understand the law, the writ of mandamus does not lie to control the discretion of an inferior tribunal or officer; it will compel such tribunal or officer to act, but never determines how such act shall be done if such inferior officer or tribunal has any discretion and the act to be performed is not merely ministerial. In the case under consideration the board of ballot commissioners have acted, and have placed T. H. Harvey on the ballot, thus discriminating between his claim to be so placed and the claim of W. W. Marcum. In doing this, the said board of ballot commissioners have necessarily exercised their discretion, and determined the question between the two candidates. Now, if this court, by the writ of mandamus, steps in and hears the testimony, and examines the certificates that were before the ballot commissioners, and reviews their action, and determines who shall be placed on the ticket to be voted for, it takes from the ballot commissioners the powers which the law confers upon them, and allows this court to use the writ of mandamus as an appellate proceeding to revise and correct the action of the ballot commissioners, which, as I conceive, is beyond the limit of the powers to be exercised by the writ of mandamus. This question has been determined in such emphatic terms again and again by this court that I thought it was at rest. In the case of *Board v. Mintburn*, 4 W. Va. 300, the court thus states the law: "The writ of mandamus is a proper remedy to compel all inferior tribunals to perform the duties required of them by law; and when there is left to the inferior tribunal no discretion but to perform the duty in a particular way, by doing a certain specified act, then the inferior tribunal acts ministerially, and may be compelled by mandamus not only to perform its duties, but to perform them by doing a certain specific act. When there is left to the inferior tribunal any discretion to perform its duty in any other way than by doing a certain specific act, then such inferior tribunal can be compelled by mandamus to act and perform the duties required of it by law, but cannot be directed what decision shall be made. In such a case the court has no jurisdiction by mandamus, and the decision of the inferior tribunal cannot be reviewed by mandamus. If any errors have been com-

mitted, the proper mode of review is by *certiorari*." If it were otherwise, this court need not compel the ballot commissioners to act, but would act for them, and there would be nothing left for them to do. In this instance W. W. Marcum and T. H. Harvey have each presented to the board of ballot commissioners certificates of their respective nominations by the same party, on the same day, to the same office; and the board of ballot commissioners, after investigation and hearing the testimony adduced by each party, have acted, and have placed Thomas H. Harvey on the ticket to be voted for; and in doing so they exercised discretion, and did not act ministerially. They might have performed the act in a different way, to wit, by placing the name of Mr. Marcum on the ticket to be voted for, which, as we have seen, this court has laid down as the distinction between a ministerial and a judicial act. This question was again passed upon, in plain, positive and unmistakable terms, in the case of *State v. Court*, 33 W. Va. 589, 11 S. E. 72, a case in which the opinion was written by Judge Snyder, in which it was held (second point of the syllabus) that "mandamus will not lie to control the discretion of any court, board, or officer when the act complained of is either judicial or quasi-judicial in its nature. (3) The inferior tribunal may be compelled to act in such a case if it unreasonably neglects or refuses to do so; but, if it does act, the propriety of its action, however erroneous and improper, cannot be questioned or controlled by mandamus. (4) Mandamus cannot be permitted to usurp the place of a writ of error or appeal; nor will it lie when there is any other adequate and complete legal remedy." To the same effect is the holding of this court in the case of *Miller v. Court*, 34 W. Va. 285, 12 S. E. 702, where it is held: (1) "Where an inferior tribunal is authorized to use its discretion, it cannot be controlled by mandamus in judicially determining questions properly presented for its consideration, and within its jurisdiction. (2) If any such inferior tribunal refuse to exercise its discretion, and render its judgment, it may be compelled to act by mandamus, but the manner of its action or the result of its decision cannot be thus controlled. (3) When such inferior tribunal has acted and rendered its decision and judgment, the writ of mandamus will not be allowed to usurp the province of an appeal or a writ of error or certiorari, and its action cannot thereby be reviewed or reversed." Other decisions might be cited to the same effect, but these are deemed sufficient, as I think, to show what has heretofore been regarded as the province and true scope of the writ of mandamus in this state. Does section 89 of chapter 25 of the Acts of 1893 enlarge the scope of the writ, or in any manner extend the limits of its jurisdictional power beyond those prescribed by the common law? I think not. When we turn to the statute, it merely provides that a "mandamus shall lie from the Supreme Court of Appeals, or any of the judges thereof

in vacation, returnable before said court, to compel any officer herein to perform any duty herein required of him." This clause is found in a section of the election law, and, as I understand, only authorizes a mandamus when an officer therein named refuses to do and perform legally—that is, as required by law—any duty therein required of him. Here this board of ballot commissioners had not refused; it had acted, and in doing so had, in its discretion, placed Thomas H. Harvey on the ticket to be voted for; and, having exercised its discretion in so doing, this court cannot, by the writ of mandamus, control or set aside this action; and, in my opinion, a peremptory writ of mandamus should be refused.

RAISCH v. BOARD OF EDUCATION OF SAN FRANCISCO.

1889. SUPREME COURT OF CALIFORNIA. 81 Cal. 542,
22 Pac. Rep. 890.

APPLICATION for a writ of mandate by Frederick Raisch against the city and county of San Francisco. From a judgment awarding the writ defendant appeals.

BELCHER, C. C.—This is an appeal from a judgment awarding the respondent a writ of mandate, and the case comes here on the judgment roll. The facts stated in the complaint are, in substance, as follows: The respondent, under and by virtue and authority of a statute of this state, entered into a written contract, by which the respondent agreed to furnish the appellant, during the fiscal year of 1884-5, rubber hose of a certain description and quality, and appellant agreed to pay, or cause to be paid, to respondent therefor a sum of money equal to 35 cents for each and every lineal foot of hose so furnished, delivered and accepted. In pursuance of this contract respondent furnished appellant, during the year named, 1,000 feet of hose at one time, and 500 feet at another time, which was all of the kind and quality named in the contract, and was received and accepted by the appellant. In due time respondent presented his claim, and demanded that appellant draw drafts on the school fund of the city and county of San Francisco, in his favor, for the amounts due him for the hose according to the contract price, but appellant refused, and has ever since refused, to draw the drafts. It is further stated that respondent has no plain, speedy and adequate remedy in the ordinary course of the law. Respondent commenced this proceeding to compel the appellant to draw the drafts asked for. Appellant interposed a general demurrer to the complaint, which was overruled, and then answered. After trial

the court found that all the allegations of the complaint were true, and all the allegations of the answer were untrue, and by its judgment granted the relief prayed for.

In support of the appeal it is claimed that the respondent had a plain, speedy, and adequate remedy by an ordinary action at law against the appellant, and hence was not entitled to the remedy by mandamus. It is said: "Petitioner should first sue the board, get a judgment (if possible), and then have the writ issued." It is admitted that appellant is a corporation created for school purposes, and that its powers and duties are defined by an act of the legislature of this state approved April 1, 1872. Stat. 1871-72, p. 846. Section 2 of that act, subd. 1, makes it a duty of the board of education of the city and county of San Francisco to furnish all necessary supplies for the schools under its care, and directs how they should be obtained. Section 7 provides for the disposition of all moneys received or collected for school purposes as follows: "All moneys received or collected on account of public education in the city and county of San Francisco shall be deposited in the city treasury and be known as the "school fund." Payment from the said fund shall be made only by the treasurer of the said city and county by drafts drawn on him by the board of education, signed by the president and superintendent of common schools, and counter-signed by the auditor of said city and county; and all drafts shall be made payable to the person or persons entitled to receive the same." And section 1, subd. 12, declares that the board shall have power "to examine and allow, in whole or in part, every demand payable out of the school fund, or to reject such demand for good cause, of which the said board shall be the sole judge."

The argument is that the board was clothed with discretionary power to allow or reject the respondent's claim, and that its discretion cannot be controlled by the courts in a proceeding like this. There can be no doubt that the board was authorized to purchase; and did purchase and receive, the hose, and that respondent fully performed all the conditions of the contract on his part. This is established by the findings, and they are not assailed. It is also clear that the respondent's claim must be paid, if paid at all, out of the school fund, and that such payment can only be made by a draft or drafts drawn by the school board, and signed and counter-signed by the designated officers. It is not pretended that respondent had any cause of action against the city and county. This being so, it is evident that, when the board purchased and received the hose, it became a matter of official duty on its part to pay the agreed price. And when it refused to do so the respondent must necessarily have had some remedy to enforce payment. It could not, of course, appropriate the hose, and leave the party furnishing it remediless. The

only question, then, is, what was his remedy? Had he a plain, speedy, and adequate one by the ordinary action at law?

It has been held in this state that, to supersede the remedy by mandamus, the party must not only have a specific, adequate legal remedy, but one competent to furnish relief upon the very subject matter of his application, and one which is equally convenient, beneficial and effective as the proceeding by mandamus. *Freemont v. Crippen*, 10 Cal. 215, 70 Am. Dec. 711; *Babcock v. Goodrich*, 47 Cal. 508; *Railroad Co. v. Railroad Co.*, *id.* 551. The board contracted to pay the respondent for the hose which he furnished, but, as it only had power to pay by drawing drafts on the school fund, its contract must be construed to be one to draw drafts, and not to pay money directly. If, then, respondent could have maintained an ordinary action, it must have been an action against the board members to recover damages for neglect of duty. But such an action would not evidently have been as convenient, beneficial and effective as the proceeding by mandamus, since it would not have compelled the board to do what it had contracted to do, and what, as we have seen, official duty required it to do.

The argument that the board had the discretion to allow or reject the claim, and that its action was final and conclusive so far as this proceeding is concerned, is without weight. It is true that, under the statute, the board may reject any demand "for good cause." But, although the board is to be the "sole judge" of what is good cause, still the rejection cannot be arbitrary or capricious. There must be at least the semblance of a cause. The board, after obtaining materials which it has ordered and needs for school purposes, cannot say: "True, the materials are of the kind and quality ordered, but we have concluded not to pay for them, and therefore reject the demand." And, whether there was a semblance of a cause for rejecting the claim or not was a question which might be and which was properly tried in the court below. Code Civil Procedure, § 1090. If there was no semblance of a cause, then it is clear that it was the duty of the board to draw the drafts, and the writ was properly granted to compel the performance of this duty. See *Wood v. Strother*, 76 Cal. 545, 18 Pac. Rep. 766, where the authorities on the subject are very fully collated and reviewed. Our conclusion is that the judgment was right, and we therefore advise that it be affirmed.

Judgment affirmed.

HAYNE, C., and FOOTE, C., concur.

PATTERSON, J., FOX, J., and THORNTON, J., dissent upon the ground that the relator has an adequate remedy in a suit for the breach of a contract.

12. Whether granted in an anticipation of an omission of duty.

STATE v. RISING.

1880. SUPREME COURT OF NEVADA. 15 Nev. 164.

By the court, BEATTY, C. J.:

The relator was convicted by a justice of the peace of Virginia City, of having violated a municipal ordinance, and was sentenced to pay a fine therefor, and, in default of payment, to be imprisoned in the city jail. From this judgment he appealed to the first district court, of which the respondent is the judge. He there demanded a jury trial, but the respondent announced that he would be tried without a jury, and set the case down on the calendar for the first of May, *proximo*.

Thereupon this application was made for the alternative writ of mandamus, commanding the respondent to impanel a jury to try the relator, or to show cause why he should not do so.

The petition was filed April 5th, and the alternative writ issued, notwithstanding grave doubts on the part of the court as to its being the proper remedy for the supposed grievance. At a subsequent day the respondent showed cause, and, besides claiming that the relator had no right to a jury trial, took the further objection that, even if he has such a right, he cannot enforce it by means of this proceeding.

This objection is, in our opinion, fully sustained by the decision in *State v. Gracey*. The rule adopted in that case is, that "mandamus is never granted in anticipation of a supposed omission of duty, however strong the presumption may be that the persons whom it is sought to coerce by the writ will refuse to perform their duty when the proper time arrives. It is therefore incumbent on the relator to show an actual omission on the part of the respondent to perform the required act, and since there can be no omission before the time arrives for the performance of the duty, the writ will not issue before that time. In other words, the relator must show that the respondent is actually in default in the performance of a legal duty then due at his hands, and no threats or predetermination can take the place of such default before the time arrives when the duty should be performed, nor does the law contemplate such a degree of diligence as the performance of a duty not yet due." 11 Nev. 233-4.

Upon these grounds it was denied in that case, notwithstanding the strong presumption that the respondent would refuse to perform his plain duty; and the relator would be injured thereby, and that he had no other plain or adequate remedy. In reference to these matters we said: "The court, however, cannot anticipate that the

auditor will not perform his duty within the time prescribed by the statute, and an actual default or omission of duty is just as essential a prerequisite to the issuance of the writ as is the want of an adequate remedy in the ordinary course of the law," p. 236.

In this case it can in no event be claimed that the respondent is in actual default. He has, it is true, announced his intention of trying the relator without a jury, and we presume that he will do so; but, even if the relator has a right to a jury trial (and we are not to be understood that he has), he has, as yet, suffered no injury, and respondent is not as yet in default.

If, as the relator claims, he has a statutory right to a jury trial in the district court, and he is denied it, he must seek his remedy in some other form.

The proceeding is dismissed.

ATTORNEY GENERAL v. CITY OF BOSTON.

1877. SUPREME JUDICIAL COURT OF MASSACHUSETTS.
123 Mass. 460.

By the statute of 1852, c. 244, the East Boston Ferry Co. was incorporated for the purpose of establishing and supporting a ferry between the mainland in the city of Boston and the island of East Boston, and was allowed to receive and collect such tolls as the mayor and aldermen should determine; and the city of Boston was authorized, at any time during the continuance of its charter, to purchase the ferry and franchise of the company, and to issue scrip in payment therefor; and thereupon to collect the same rate of toll as was allowed to the company; provided that, whenever the tolls collected shall be sufficient to reimburse the city for the cost of the ferry, with annual interest on the scrip, and for all the expenses of the repairs and additions to the ferry, and all current and incidental expenses of its superintendence and its management, and to provide a sufficient sum for its future support, "then the tolls on said ferry shall cease, and said ferry shall ever afterwards be maintained by said city of Boston as a free ferry." By the statute of 1869, c. 155, § 1, the city council, "for the purpose of improving private property, and of protecting the same and the travel and business between the main land in said city and East Boston from the disabilities and the burdens of the ferry communications heretofore existing between the said parts of the city, and for furnishing additional facilities to said travel and business," was authorized to purchase the ferry and franchise of the company, and to cause the ferry to be maintained "in such manner and upon such rates of ferriage as the

board of aldermen of said city shall from time to time judge the best interests of said city to require, excepting only as hereinafter provided." By the subsequent sections of this statute the city council, "upon the completion of said purchase," was authorized to determine whether the interests of the city would be best promoted by maintaining the ferry free of tolls, either "thereafter" or "for a term of not less than ten years next succeeding said purchase"; and, if either of these alternatives was adopted, the board of aldermen was to adjudge whether East Boston, or any and what part thereof, would receive special benefit and advantage from the purchase, and provision was made for the assessment and levy of a portion of the cost upon the owners of real estate, in the territory so adjudged to be benefited. In 1870 the city purchased the ferry, and maintained it for seven years afterwards at rates of toll fixed by the aldermen.

On July 30, 1877, the council passed an ordinance in the following terms: "Ordered, that on and after the first day of January, 1878, the tolls on the East Boston ferries be abolished, and the said ferries be run free to the public travel." Petition prayed for mandamus commanding the city of Boston to continue to collect tolls after said Jan. 1, 1878."

GRAY, C. J.—(After holding that it was the intention of the legislature that the question whether the ferry as maintained by the city was to be a free or a toll ferry was to be determined once for all by the city, upon purchasing same, and that, having then determined it should be a toll ferry, and such toll having been collected for many years, the order abolishing tolls is without authority and void.)

It is insisted by the learned counsel for the city that, assuming the order of the city council to be illegal and void, this court is powerless to restrain or control its operation before the time when it will by its terms take full effect. But this position to us appears to be unsupported by the authorities cited, and to be inconsistent with the very nature of mandamus, the power of issuing which is vested in the highest court of common law jurisdiction, and the proper office of which is to compel, not only inferior courts, but also officers and corporations, to obey and execute the laws; especially in matters of public concern, when no other equally effectual remedy is provided.

"The reason why we grant these writs," said Lord Hardwicke, when presiding over the King's Bench, "is to prevent a failure of justice, and for the execution of the common law, or of some statute, or of the King's charter." *King v. Wheeler*, Cas. temp. Hardw. 99; S. C. Cunn. (K. B.) 155. The same idea was more fully expressed by Lord Mansfield, as follows: "A mandamus is a prerogative writ; to the aid of which the subject is entitled, upon a proper case previously shown, to the satisfaction of the court. The original

nature of the writ, and the end for which it was framed, direct upon what occasions it should be used. It was introduced to prevent disorder from a failure of justice, and defect of police. Therefore it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one. Within the last century, it has been liberally interposed for the benefit of the subject and advancement of justice. The value of the matter or the degree of its importance to the public police, is not scrupulously weighed. If there be a right, and no other specific remedy, this should not be denied." *Rex v. Barker*, 3 Burr. (K. B.) 1265, 1267.

The granting of the writ of mandamus rests in the sound judicial discretion of the court, which has cautiously abstained from laying down any limits to the exercise of this discretionary power. In *Strong's case*, Mr. Justice Morton said: "In every well constituted government, the highest judicial authority must necessarily have a supervisory power over all inferior or subordinate tribunals, magistrates and all others exercising public authority. If they commit errors, it will correct them. If they refuse to perform their duty, it will compel them. In the former case by writ of error, in the latter by mandamus. And generally, in all cases of omissions or mistakes, where there is no other adequate or specific remedy, resort may be had to this high judicial writ. It not only lies to ministerial, but to judicial officers. In the former case it contains a mandate to do a specific act, but in the latter only to adjudicate, to exercise a discretion, upon a particular subject."

Neither the fact that the respondent is a municipal corporation, nor the fact that the board of aldermen has a discretionary power to fix the rates of toll, affords any reason why the city should not be compelled by mandamus to perform the duty, imposed upon it by law, of running the ferry as a toll ferry. In *East Boston Ferry Co. v. Boston*, 101 Mass. 488, a writ of mandamus was issued on the application of the East Boston Ferry Co., before the purchase of the ferry by the city, to compel the mayor and aldermen to establish rates of toll in accordance with the statute of 1852, c. 244, § 2. And in *Attorney General v. Lawrence*, 111 Mass. 90, a writ of mandamus was issued to compel the two branches of a city council to meet in convention to elect a commissioner of streets, whose office was established only by a municipal ordinance which was subject to be repealed at any time by the city council.

It is said in *Tapping Mand. 10*, cited for the respondent, that a "mandamus will not be granted in anticipation of a defect of duty or error of conduct." But the only reference of the learned author in support of this proposition is to *Blackborough v. Davis*, 1 P. W. 48; and an examination of that case shows that the passage referred

to was but a remark of the counsel, not assented to or acted upon by the court.

The case was this: A man had died intestate, leaving as his next of kin a grandmother and an aunt, and the prerogative court had granted administration to the grandmother, but had made no order of distribution. An application was made in the King's Bench for a writ of mandamus to the judge of the prerogative court, commanding him to direct distribution to the aunt as well as to the grandmother. It was argued by counsel that no mandamus would lie to compel payment to legatees or to those entitled as next of kin under the statutes of distributions. To this Lord Holt answered: "If the ecclesiastical judge act contrary to law, may not this court oblige him to pursue the law? Is there any difference between granting a prohibition to stop them from going wrong and a mandamus to guide them right?" It was further argued for the respondent, "No mandamus ought to go, at least till the court have erred, for this court will not anticipate the judgment of the spiritual court;" or, as stated in another report, "Where a judge below is to give judgment, and it is not known yet which way he will judge, to command him beforehand to do his duty, is very odd." But Lord Holt, disregarding the suggestion, said: "I would fain know how it comes to pass, that the spiritual court have not pursued the ancient civil law, but have varied that by the Novels?" "If the spiritual court, since the statute of Car. II, shall attempt a distribution contrary to the rules of the common law, we will prohibit them; for, by that statute they are restrained to the rules allowed among us." And, after advisement, the court decided the case upon its merits, and refused the writ of mandamus, solely because the grandmother was nearer of kin to the intestate than the aunt. *Blackborough v. Davis*, 1 P. W. 41, 47-53 inc.; S. C. 12 Mod. Rep. (K. B.) 615, 621-626 inc.

In the only other English case cited for the respondent, the master of a hospital, having refused to affix the common seal, to the presentation of a person to a living, who had been elected by a majority of the corporation, was compelled by a writ of mandamus to do so, although no deed of presentation had been tendered to him; and this, not on the ground that the tender had been waived, "but because that which the master was called on to perform was simple." *Queen v. Kendal*, 1 Q. B. 366, 386 note; S. C. 4 Per. & Dav. (K. B.) 603, 606.

The passage cited for the respondent from High Ex. Rem., § 12, substantially accords with the statement of Tapping, above quoted. But the only cases there referred to are from Maryland, Kansas and Louisiana, and differ so widely from the case before us that we need not consider whether they were well decided. In the cases in Maryland and Kansas, the only day when the respondents could by law act upon the subject in question had either passed or had not

arrived when the writ of mandamus was applied for. *Commissioners v. Commissioners*, 20 Md. 449; *State v. State Canvassers*, 3 Kan. 88. The cases in Louisiana were attempts by a creditor of a municipal corporation, or of the state, to secure a priority by writ of mandamus, to its treasurer to pay the debt of the petitioner; and the writ was refused in the one case, because it appeared by the record that the proceedings were fictitious and collusive, and in the other, because the treasurer had not yet received the money, and could not therefore be in fault in not paying it. *State v. Burbank*, 22 La. Ann. 298; *State v. Dubuclet*, 24 La. Ann. 16.

Application for writs of mandamus being addressed to the sound judicial discretion of the court, the circumstances of each case must be considered in determining whether a writ of mandamus shall be granted; and the court will not grant the writ unless satisfied that it is necessary to do so in order to secure the execution of the laws. But, when the person or corporation against whom the writ is demanded has clearly manifested a determination to disobey the laws, the court is not obliged to wait until the evil is done to issue the writ.

In the case of *King v. Milverton*, 3 Ad. & E. (K. B.) 284, a court leet was proved to have been held, as long as the deponents could recollect, in October annually, and to have been held by the present lord in October, 1833. He had been requested to hold a court in October, 1834, and had taken no steps in consequence of the request, but did not appear to have expressly refused to hold the court. An application to the court of King's Bench on November 24, 1834, for a writ of mandamus to compel the holding of the court, was opposed by Sir William Follet, upon the ground that the court could only be held in October, and that "the utmost that could be done would be to compel the holding of the court in October next; but as the lord has not absolutely refused, that cannot be done in the present case"—clearly implying that, if he had absolutely refused, it could be done. Sir Frederick Pollock replied: "Practically, the question is, whether this court leet is ever to be held at all; for if the court will not grant the mandamus to hold at the proper time, before that time arrives, and if, after the time has passed, the mandamus cannot be granted to hold at any other time, there are no means of enforcing the performance of the duty and the objection would destroy the general power of this court to enforce the holding of court leet by mandamus." The court, simply observing that it was doubtful whether any charter or prescription existed limiting the time, and that such a limitation could not be assumed, and that great public inconvenience might accrue if a mandamus were refused on such grounds, ordered the writ to issue.

In *Queen v. The Eastern Counties Railway*, 10 Ad. & E. (K. B.) 531; S. C. 2 Per. & Dav. (K. B.) 648, and 4 Per. & Dav. (K. B.) 46; it was held that a railway company which had purchased lands and

begun works on a part only of the line authorized by its charter, and which, as the affidavits showed reasonable cause for believing, intended to abandon the rest of the line, might be compelled by mandamus to complete the line, although the application for the writ was made long before the expiration of the time allowed by parliament for such completion. See also *Attorney General v. Birmingham, etc.*, R. Co., 4 De G. & Sm. (Ch.) 490, 498. To the same effect were the decisions of the Queen's Bench in *Queen v. The York, etc.*, R. Co., 1 El. & Bl. (Q. B.) 178; *Queen v. Lancashire, etc.*, R. Co., 1 El. & Bl. (Q. B.) 228; and *Queen v. Great Western R. Co.*, 1 El. & Bl. (Q. B.) 253. The judgment in the Exchequer Chamber in 1 El. & Bl. (Q. B.) 858, 873 note, 874, which reversed some of these decisions, went upon the ground that the acts of Parliament in question had not imposed any obligation upon the defendants, without touching the point that, if they had, a writ of mandamus might be applied for before the time had expired. *Edinburgh, etc.*, R. Co. v. Philip, 2 Macq. H. L. Cas. (Scotch) 514, 526.

In *Webb v. Commissioners, L. R. 5 Q. B. 642*, commissioners were incorporated by act of Parliament for the purpose of improving a town, and were empowered to levy rates, to borrow money, and to issue debentures. A holder of such debentures moved for a mandamus to compel the commissioners to apply their funds in payment of the interest thereon. It was objected that rates might not be levied, and that the form of the mandamus should have been to levy rates out of which to pay the interest on the debentures. But the court held that the mandamus should issue as prayed for, and said if the commissioners should not levy rates, the petitioner would be entitled to another mandamus to compel them to do so.

In a very recent case in this court, a statute authorizing the city of Boston, for the purpose of abating a public nuisance, to raise the grade of lands in a particular district, and to assess the expense thereof upon the owners of the lands, provided that any person entitled to any estate in such land, and dissatisfied with the assessment, might give notice to the city council, and thereupon the city should take his land, and within sixty days thereafter file in the registry of deeds a description thereof, together with the statement that it was taken under the statute, which description and statement should be signed by the mayor, and the title to the land so taken should vest in the city. The owner of an estate in such land, being dissatisfied with the assessment, gave notice accordingly, and offered to surrender his estate to the city. The city council neglected to take it, and passed an order vacating the assessment. The owner applied for a writ of mandamus to the city council and to the mayor, both of whom in their answers relied on the order vacating the assessment. It was held that, as soon as the assessment was made, the owner had the right to surrender his estate, and the city council

could not thereafter vacate the assessment, and that the mandamus should issue, not only to the city council to take the land, but to the mayor to sign the description and statement, although he could not do so or be in default for not doing so, until the city council had passed an order taking the land, and although he might by the statute sign the description and statement at any time within sixty days after the taking. Stat. 1873, c. 340, §§ 1-4 inc.; *Farnsworth v. Boston*, 121 Mass. 173.

The court have, affirming the right of the attorney general to bring the action, ordered that the alternative writ of mandamus issue.

The general assertion in the text books is that the writ will not issue to prevent an anticipated omission of duty. This rule is hardly sustained by the best considered cases. In general, the court's discretion will largely determine whether the writ shall issue under the circumstances of the particular case without paying much attention to the rule above quoted.

It has been held that there may be such a refusal in advance of the time actually fixed for performance, or such manifest intention not to perform the specific duty, that a court will be justified in issuing the writ before there has as a matter of fact been any real default. *State v. Wrightson*, 56 N. J. L. 126, 28 Atl. 56; *Brandt v. Murphy*, 68 Miss. 84, 8 So. Rep. 296; *State v. Rotwitt*, 15 Mont. 29, 37 Pac. 845.

13. Statute of limitations affecting actions in mandamus.

AUDITOR v. HALBERT.

1880. COURT OF APPEALS OF KENTUCKY. 78 Ky. 577.

CHIEF JUSTICE COFER delivered the opinion of the court.

This was an application for a mandamus commanding the auditor of public accounts to draw his warrant upon the treasurer for the sum of eighty dollars.

The facts were these:

The appellee was elected commonwealth's attorney for the fourteenth judicial district, in August, 1868, for a term of six years. During the year 1873, without any neglect of duty on his part, a commonwealth's attorney *pro tempore* was appointed by the circuit court of his district, and an allowance was made to the attorney so appointed, which was certified to the auditor and paid; and the amount so paid was deducted from the appellee's salary for that year.

In June, 1880, the appellee filed his petition in the fiscal court, praying for a mandamus. The auditor pleaded the statute of limi-

tations. The court sustained a demurrer to the answer, and awarded the writ. The auditor has appealed.

There is no statute in this state in terms prescribing a limitation to a proceeding in mandamus.

The attorney general contends that the case falls within that clause of section 2, article 3, chapter 74, of the General Statutes, which prescribes a limitation of five years to "an action upon a liability created by statute."

The counsel for the appellee contends that this statute does not apply, because:

1. The proceeding for a mandamus is a motion and not an action; and,

2. The salaries of public officers are held by the officers of the commonwealth as trustees.

1. The word "action", as used in the statute of limitations, is not restricted in its signification to that which is technically an action, but includes all civil proceedings in courts of justice for the enforcement of legal or equitable rights, whether by action, suit, or special proceeding.

The statute applies to the cause of action—the case presented by the plaintiff—and whether a particular case is embraced by the statute is to be determined by ascertaining whether it is included in the causes of action to which the statute is made applicable; and neither the form of the proceeding nor the name by which it may be called can have any influence on the question whether the statute applies.

Is this a proceeding upon a cause of action created by statute?

The appellee was entitled to his salary only because the statute gave it to him, and it was the duty of the auditor to draw his warrant for the salary only because the statute so declared. Both the right of the appellee and the duty of the auditor are created by statute. Without it neither would exist. It seems, therefore, to follow that this is a proceeding on a liability created by statute, and is embraced by the clause of the statute of limitations quoted above. unless, as contended, the auditor is a trustee, and thereby precluded from pleading the statute. That he is not is quite clear. He is a trustee, in a certain sense, for the state, but certainly not for the creditors of the state. He owes them no duty except to pay them for what they are lawfully entitled to, and is no more a trustee for them than an individual debtor is a trustee for his creditors.

Wherefore, the judgment is reversed, and the cause remanded, with directions to overrule the demurrer to the answer.

In accord: *Prescott v. Gonser*, 34 Ia. 175; *State v. School Dist.*, 30 Neb. 520, 46 N. W. 613; *Bd. of Supervisors v. Gordon*, 82 Ill. 435; *People v. Supervisors of Westchester*, 12 Barb. (N. Y.) 446; *Georges Creek Coal and Iron Company v. Commissioners*, 59 Md. 255; *Avery v. Krakow*, 73 Mich. 622, 41 N. W. 818; *People v. Chapin*, 104 N. Y. 96.

CHINN v. TRUSTEES, ETC.

1877. SUPREME COURT COMMISSION OF OHIO. 32 Ohio St. 236.

SCOTT, J.—The plaintiff in error applied to the district court of Lawrence county for a writ of mandamus, commanding the defendants in error to execute and deliver to him a township bond of Fayette, for one hundred dollars, in compliance with the requirements of the act of April 16th, 1867, “to authorize and require the payment of bounties to veteran volunteers,” and the acts amendatory thereof.

The facts stated in his relation were such as to bring his case, *prima facie* at least, within the purview of said statute and to entitle him to said bond. He avers in his relation that, since the year 1867, he has often requested the trustees of said township, and their successors in office, including the present board of trustees, to draw, perfect, and deliver to him such bond, which they have refused, and still refuse to do.

His application was made to the district court, August 9th, 1873. The defendants answered, and for their first defense alleged “that the cause of action on which plaintiff’s application is based, accrued to him, against the defendants, more than six years prior to the commencement of this suit, by the said plaintiff, and so they say that this action is barred by the statute of limitations.” To this defense the relator demurred. The court overruled his demurrer and thereupon dismissed his case at his costs. For alleged error in this action of the court below the plaintiff here prosecutes his petition in error.

The Code of Civil Procedure limits the time within which an action can be brought “upon a liability created by statute, other than a forfeiture or penalty,” to six years. § 14. This provision is found in title 2 of the Code, the object of which is to define and prescribe “the time of commencing civil actions.” The civil action of the Code is a substitute for all such judicial proceedings as, prior thereto, were known, either as actions at law or suits in equity. § 3. By section 8, the limitations of this title are expressly confined to civil actions. But proceedings in mandamus were never regarded as an action at law, or a suit in equity, and are not, therefore, a civil action within the meaning of the Code. Mandamus is an extraordinary or supplementary remedy, which cannot be resorted to if the party has another adequate, specific remedy. The Code provides for and regulates this remedy, but does not recognize it as a civil action. It declares that the writ of mandamus may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law. § 570. And in section 577 it provides

that: "No other pleading or written allegation is allowed than the writ and answer."

These are the pleadings in the case, and have the same effect, and are to be construed, and may be amended, in the same manner as pleadings in a civil action; and the issues thereby joined must be tried and the further proceedings thereon had in the same manner as in a civil action. This language clearly implies that mandamus is not comprehended within the civil action of the code, to which alone the limitations of title 2 are applicable as an absolute bar.

In holding otherwise we think the court below erred, and its judgment, therefore, must be reversed.

We do not, however, mean to intimate that, because there is no statutory limitation to the time within which a writ of mandamus may be obtained in this state, a party may delay his application therefor at pleasure, without detriment to his rights. Where the relator has slept on his rights for an unreasonable time, and especially if the delay has been prejudicial to the defendant, or to the rights of other persons, the court, in the exercise of a sound discretion, may well refuse the writ. In a case in New York, where the relator sought by mandamus to have judicial proceedings set aside, the court refused the writ because of an acquiescence in the proceedings for one year. 2 Wend. (N. Y.) 264. In another case it was held that mandamus might be brought within the time fixed for the limitation of other similar or analogous remedies. *People v. Supervisors*, 12 Barb. (N. Y.) 446. The justice and equity of this rule would, in many cases, be questionable. *Moses on Mandamus*, 190. What laches, in the assertion of a clear legal right, would be sufficient to justify the refusal of the remedy by mandamus, must depend in a large measure on the character and circumstances of the particular case.

These circumstances may often be fully developed only on the trial of the case, as the statute permits no reply to the answer of the defendant. For the purpose of the demurrer in this case the relator admits a delay of six years. But, for all other purposes, such delay is to be regarded as denied. How long, and under what circumstances, the relator has slept upon his rights, and what prejudice, if any, has resulted therefrom to the defendants, or to other persons, are facts to be ascertained upon the trial of the case, and considered by the court, in determining whether such laches is disclosed, and to justify a denial of the remedy sought.

The answer of the defendants contains a second defense, to which the plaintiff in error demurred, and his demurrer was sustained by the court. Of this action he, of course, does not complain. But counsel for the defendant suggests that the court erred in sustaining the demurrer, and that the facts stated in this defense justify the court in dismissing the plaintiff's case. It may be sufficient to say

that we think the facts relied on do not constitute a legal bar to the relator's claim.

The judgment of the court below will be reversed, the demurrer of the plaintiff to the first defense of the defendants be sustained, and the case remanded to the district court for trial upon its merits.

Judgment accordingly.

In accord: *Territory v. Potts*, 3 Mont. 364; *State v. Kirby*, 17 S. Car. 563; *State v. Stock*, 38 Kan. 154, 16 Pac. 106; *Amy v. City of Galena*, 10 Biss. (U. S. Cir.) 263; *Rice v. Bd.*, 50 Kas. 149, 32 Pac. 134; *Mitchell v. Boardman*, 79 Me. 469, 10 Atl. 452; *People v. Chapin*, 104 N. Y. 96; *State v. Capeller*, 39 Ohio St. 455; *State v. Jennings*, 48 Wis. 549, 4 N. W. 641; *State v. Finley*, 74 Mo. App. 213; *Eggleston v. Kent* Cir. Judge, 50 Mich. 147, 15 N. W. 55.

14. Renewal of application for mandamus.

STATE v. HARD.

1879. SUPREME COURT OF MINNESOTA. 25 Minn. 460.

GILFILLAN, C. J.—Alternative mandamus to compel the respondent, auditor of Fillmore county, to issue a warrant upon the county treasurer for the amount certified by the judge of the district court to be due the relator as court reporter, for transcribing the minutes of evidence in certain cases. It appears that upon the same certificate, and the same demand upon the auditor, proceedings by alternative mandamus were instituted by the relator against the respondent in the district court, and, after a full hearing, the alternative writ was dismissed, not for any technical defect in the writ, but upon the ground which, as the district court held, showed the relator not entitled to relief. That decision was on the merits of the relator's claim, and is a bar to this proceeding. If the decision of the district court was erroneous, and its dismissal of the proceedings based upon insufficient grounds, the relator's remedy is by appeal, and not by renewing the proceedings in another court.

Alternative writ dismissed.

Section 2.—Mandamus to Inferior Courts and Judicial Officers.

1. May compel court to act but cannot control its decision.

EX PARTE MORGAN AND ANOTHER.

1885. SUPREME COURT OF UNITED STATES. 114 U. S. 174.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This is an application for a writ of mandamus requiring the Circuit Court of the United States for the district of Indiana to amend a judgment entered January 20, 1883, in a cause wherein the relators were plaintiffs and Frederick Eggers, defendant, "so as to conform to the complaint in said cause, and to the finding or verdict of the court rendered upon the trial of said cause."

The suit was ejectment to recover the possession of "all the north part of lot 2, in section 36, T. 38, N. R. 10 W. of the second principal meridian, which lies west of the track of the Lake Shore and Michigan Southern R. R., and north of a line parallel with the north line of said lot 2, and seven hundred and fifty-three feet south therefrom."

The judgment entry, which includes the only finding in the case, is as follows:

"And the court, having heard the evidence and being fully advised, finds for the plaintiff, and orders and adjudges that they are entitled to, and shall have and recover of the defendant, the possession of so much of said lot two (2) as lies south of the south line of lot number one (1), as indicated by a fence constructed and maintained by the defendant as and on said south line, said fence running from the State line easterly to Lake Michigan, and assessing the damage at \$1 and costs taxed at \$—, which the plaintiffs shall recover of the defendant. All of which is finally ordered adjudged, and decreed."

After this entry the petitioner moved the court to amend and reform the judgment so that it would "conform to the complaint in said court and to the finding or the verdict"; but the court, on full consideration, decided that the finding and judgment were not separate and distinct, and that the meaning was clear. The entry was to be construed as finding and adjudging that the plaintiffs were only entitled to recover the possession of so much of the premises sued for as lies south of the fence indicated. For this reason the motion was denied.

It is an elementary rule that a writ of mandamus may be used to require an inferior court to decide a matter within its jurisdiction and pending before it for judicial determination, but not to control the decision. *Ex parte Flippen*, 94 U. S. 350; *Ex Parte R. Co.* 101 U. S. 720; *Ex parte Burtis*, 103 U. S. 238. Here a judgment has been rendered and entered of record by the circuit clerk in a suit

within its jurisdiction. The judgment is the act of the court. It is recorded ordinarily by the clerk as the ministerial officer of the court, but his recording is in legal effect the act of the court, and subject to judicial control. The clerk records the judgments of the court, but does not thereby render the judgments. If there is error in the judgments as rendered it cannot be corrected by mandamus, but resort must be had to a writ of error or an appeal. *Ex parte Loring*, 94 U. S. 418; *Ex parte Perry*, 102 U. S. 183.

If a clerk in performing the ministerial act of recording a judgment has committed an error, the court may on motion at the proper time correct it, or it may do so in a proper case upon its own suggestion without waiting for the parties. Here the plaintiffs, believing that the judgment as recorded did not conform to the finding, moved the court to amend it in that particular. This motion the court entertained, but, being of the opinion that the judgment had been correctly recorded, refused the amendment which was asked. In this the court acted judicially, and its judgment on the motion can no more be reviewed by mandamus than that which was originally entered in the cause.

The writ is denied with costs.

THE LIFE AND FIRE INSURANCE COMPANY OF NEW YORK v. ADAMS.

1835. SUPREME COURT OF UNITED STATES. 9 Pet. (U. S.) 571.

MOTION for a mandamus to be directed to the District Judge of the district of Louisiana, commanding him to make and enter certain judgments and orders in a suit pending before him, wherein judgment had been confessed by one Barker claiming to represent the defendant Adams.

MARSHALL, C. J., delivered the opinion of the court.

Counsel having given more precision to the general application of the petitioners, by presenting five separate and alternative prayers for the mandamus commanding a particular thing; each application founded on the rejection of that preceding it.

The first is for such an execution as that which was issued on the 12th of March, 1834, at the instance of the plaintiffs, being an execution for the amount of all the notes secured by the mortgage and transaction in the petition mentioned, to be levied on the mortgaged property; but if not sufficient, then on the property generally of Christopher Adams, whereof he was the owner on the 18th of May, 1826, into whose hands soever the same may have come.

Judge Harper has shown for cause against the execution of the whole debt, on the judgment rendered by Judge Robertson on the 18th day of May, 1826, that the whole debt was not yet due, and that the judgment in its terms, comprehends that portion of the debt only which is actually due. He shows for cause against any execution founded on the paper delivered by Josiah Barker on the 10th day of March, 1834, that Josiah Barker exhibited no power of attorney from Christopher Adams, and showed no right to personate him. That the court did not receive his confession as the confession of Christopher Adams, or enter any judgment upon it. Of consequence, that act cannot warrant an execution of any description.

The record, we think, verifies these statements.

If the cause shown against a mandamus to issue such a writ of execution as asked for, or the judgment in its present state be deemed sufficient, then the petitioners ask for a mandamus commanding the judge to amend such judgment, by extending the terms thereof, so as to make the same absolute upon all the notes and sums of money enumerated in the original transaction, etc.

To extend the judgment to subjects not comprehended within it, is to make a new judgment. This court is requested to issue a mandamus to the court for the eastern district of Louisiana, to enter a judgment in a cause supposed to be depending in that court; not according to the opinion which it may have formed on the matter in controversy, but according to the opinion which may be formed in this court on the suggestion of one of the parties. This court is asked to decide that the merits of the case are with the plaintiffs, and to command the district court to render judgment in their favor. It is an attempt to introduce the supervising power of this court into a cause while depending in an inferior court, and prematurely to decide it. In addition to the obvious unfitness of such a procedure, its direct repugnance to the spirit and letter of our whole judicial system cannot escape notice. The supreme court, in the exercise of its ordinary appellate jurisdiction, can take cognizance of no case until a final judgment or decree has been made in the inferior tribunal. Though the merits of the case may have been substantially decided, while any thing, though merely formal, remains to be done, this court cannot pass upon the subject. If from any intermediate stage in the proceedings an appeal might be taken to the supreme court, the appeal might be repeated to the oppression of the parties. So if this court might interpose by way of mandamus in the progress of a cause, and order a judgment or a decree, a writ of error might be brought to the judgment, or an appeal prayed from the decree; and a judgment or decree entered in pursuance to a mandamus might be afterwards reversed. Such a procedure would subvert our whole system of jurisprudence.

The mandamus ordered at the last term, directed the performance of a mere ministerial act. In delivering its opinion, the court said:

"On a mandamus, a superior court will never direct in what manner the discretion of an inferior tribunal shall be exercised; but they will, in a proper case, require the inferior court to decide." To order the district court to give judgment for the plaintiffs is "to direct in what manner its discretion shall be exercised."

Sufficient cause is shown against granting this prayer.

In the event of this prayer being rejected, the court is asked to award a writ of mandamus to the district judge, commanding him to consummate the interlocutory part of the said judgment, by entering and signing final judgment upon and for all the notes and sums of money mentioned in the transaction aforesaid as not being then due, and thereupon to issue such execution, etc.

This prayer does not vary substantially from its predecessor. It requires the same interference of the supreme court in the proceedings of the inferior court while in progress, and the same direction how its discretion shall be exercised. It requires a direction to the district court to give judgment for one of the parties, and prescribes the party for whom it shall be given. The cause against granting the preceding prayer applies equally to this.

Should this last prayer also be rejected, the court is next asked to award a mandamus commanding the district judge to compel the marshal duly to execute such process as may be issued, notwithstanding the cession of the estate of the said Adams, and the appointment of a provisional syndic thereof. It is the duty of the marshal to execute all process which may be placed in his hands; but he performs this duty at his peril, and under the guidance of the law. He must, of course exercise some judgment in its performance. Should he fail to obey the exigent of the writ without a legal excuse, or should he, in obeying its letter, violate the rights of others, he is liable to the action of the injured party.

In the particular case in which the creditor asks for a mandamus to the district judge to compel the officer to seize and sell the property mentioned in the writ, that property is no longer in possession of the debtor against whom the process is directed; but has been transferred by law to other persons, who are directed by the same law, in what manner they are to dispose of it. To construe this law, or to declare the extent of its obligation, the questions must be brought before the court in proper form, and in a case in which it can take jurisdiction. This case, so far as it is before any judicial tribunal, is depending in a district court of the United States, and perhaps in a state court of Louisiana. The Supreme Court of the United States has no original jurisdiction over it, and cannot exercise appellate jurisdiction previous to a final judgment or a decree, further than to order acts, purely ministerial, which the duty of the district court requires it to perform. This court cannot, in the present condition of the case, construe judicially the laws which govern it, or decide in whom the property is vested. In so doing, it would

intrude itself into the management of a case requiring all the discretion of the district judge, and usurp his powers.

The mandamus cannot be granted as prayed.

The 5th prayer asks a mandamus requiring the judge to compel the marshal to execute the writ of execution heretofore issued, on the 30th of April 1834, on the said judgment for the amount of the notes of the said Adams, due on the 16th of May, 1826, notwithstanding the cession and other matters mentioned by the marshal in the return thereof.

This prayer differs from that which preceded it only in the amount for which the execution is to issue. So far as respects the interference of the supreme court in construing laws not regularly before it, and controlling the discretion of the district court, they stand on precisely the same principle. The objections therefore, which were stated to granting the 4th prayer, apply equally to the 5th.

The court cannot grant a mandamus ordering the district court to perform any one of the specific acts which have been stated in the petition, or in the more particular application contained in the statement presented by counsel.

Though the supreme court will not order an inferior tribunal to render judgment for or against either party, it will, in a proper case, order such court to proceed to judgment. Should it be possible, that in a case ripe for judgment, the court before whom it was pending could perseveringly, refuse to terminate the cause, this court, without indicating the character of the judgment, would be required by its duty to order the rendition of some judgment; but, to justify this mandate, a plain case of refusing to proceed in the inferior court ought to be made out. In *Ex parte Bradstreet*, 8 Pet. (U. S.) 590, this court said: "We have only to say, that a judge must exercise his discretion in those intermediate proceedings which take place between the institution and the trial of a suit; and if, in the performance of this duty, he acts oppressively, it is not to this court that application is to be made."

In the case now under consideration, no application is made for a mandamus directing the court generally to proceed to judgment. The petitioners require a mandamus, ordering the judge to render a specific judgment in their favor. It is not even shown that the case is in a condition for a final judgment; nor is it shown that the judge is unwilling to render one. The contrary may rather be inferred from his readiness to grant a rule on the defendant, requiring him to show cause why a judgment should not be rendered. In a case of such long standing, where it is more than possible that the defendant might not be in court; where judgment is asked on a confession made by the agent of the plaintiffs, professing to be the attorney of

the defendant; the judge may be excused for requiring that notice should be given to the defendant.

The rule is discharged.

McLEAN, J. I concur with the opinion which has just been delivered.

At first, I was inclined to think that, under the general prayer for relief, the court might award a mandamus directing the district judge to enter a judgment in the case. Not that this court, on a mandamus, should direct the district court to enter a judgment in behalf of either party; but that, in the due exercise of its discretion, it should proceed to render a judgment in the case, in order that such judgment might be brought before this court for revision, by writ of error.

But as there is no specific prayer for a mandamus, on the ground that the court has refused to give a judgment, I am content, as it involves a mere question of practice, to agree with my brother judges that the prayer for this writ must point out specifically the ground of the application.

See also, *Virginia v. Reeves*, 100 U. S. 313; *Ex parte Denver, etc.*, R. Co., 101 U. S. 711; *Ex parte Baltimore, etc.*, R. Co., 108 U. S. 566; *Ex parte Redd*, 73 Ala. 548; *People v. Knickerbocker*, 114 Ill. 539, 12 N. E. 507; *Carpenter v. Bristol Commissioners*, 21 Pick. (Mass.) 258; *State v. Marshall*, 82 Mo. 484; *State v. Cramer*, 96 Mo. 75, 8 S. W. 788.

2. Mandamus in civil actions generally.

EX PARTE MYRA CLARKE WHITNEY.

1839. SUPREME COURT OF UNITED STATES. 13 Pet. (U. S.) 404.

STORY, J., delivered the opinion of the court.

This is the case of a motion made on behalf of Myra Clarke Whitney for a mandamus, to the circuit court of the eastern district of Louisiana. The petition on which the motion is founded states, that a bill in equity is now pending in the said circuit court, in which the petitioner is plaintiff, against Richard Relf and others, defendants; that it is understood to be the settled determination of the district judge not to suffer chancery practice to prevail in the circuit court; that her right to proceed in her suit has been denied, until she shall cause copies of her bill in the French language to be served upon the defendants or some of them, and until she shall file documents which are not made exhibits in the case; and then that all further proceedings in the cause shall be in conformity with the existing practices of the court, which existing practice is understood to mean the prac-

tice prevailing in the court in civil cases generally, in disregard of the rules established by the Supreme Court to be observed in chancery cases. The prayer of the petitioner is for a mandamus in the nature of a *procedendo*, to compel the court to proceed according to chancery practice, to award an attachment, and compel Relf to answer the bill, and to suffer the petitioner in all things to proceed in the cause in such manner as the constitution and laws of the United States and the principles and usages in equity will authorize. A copy of the bill, and the orders and proceedings of the district judge thereon, are presented with the petition.

That it is the duty of the circuit court to proceed in this suit according to the rules prescribed by the supreme court for proceedings in equity cases at the February term thereof, A. D. 1822, can admit of no doubt. That the proceedings of the district judge, and the orders made by him in the cause, which are complained of, are not in conformity with those rules and with the chancery practice, can admit of as little doubt. But the question before us is not as to the regularity and propriety of those proceedings, but whether the case before us is one in which a mandamus ought to issue. And we are of the opinion that it is not such a case. The district judge is proceeding in the cause, however irregular that proceeding may be deemed; and the appropriate redress, if any, is to be obtained by an appeal after the final decree shall be had in the cause. A writ of mandamus is not the appropriate remedy for any orders which may be made in a cause by a judge in the exercise of his authority; although they may seem to bear harshly or oppressively upon the party. The remedy in such cases must be sought in some other form.

The motion for the mandamus is therefore denied.

See also, *Ex parte McKissack*, 107 Ala. 493, 18 So. 140; *People v. McLane*, 62 Cal. 616; *Starnes v. Tanner*, 73 Ga. 144; *State v. Judge*, 32 La. Ann. 549; *Chandler v. Antrim*, Cir. Judge, 97 Mich. 621, 57 N. W. 193; *Ex parte Koon*, 1 Denio (N. Y.) 644.

3. Mandamus to compel dismissal or re-instatement of causes.

STATE v. O'BRYAN.

1890. SUPREME COURT OF MISSOURI. 102 Mo. 254, 14 S. W. 933.

SHERWOOD, J. In the common pleas court of Cape Girardeau County, a judgment was recovered by Bernhardt Schonhoff against the Jackson R. Co for \$3,000.00; this judgment was reversed in this court and the cause remanded to the court whence it came. On its arrival there, the defendant, by its attorney, filed its motion and affidavit for a change of venue from Cape Girardeau County, based

upon the prejudice of the inhabitants of Cape Girardeau county against defendant.

Pending said motion, the defendant filed another motion, to certify and transfer said cause to the circuit court of Cape Girardeau county, based upon the grounds that the judge of said common pleas court had been of counsel in the cause, which motion was by the court overruled; but certifying to the fact that the judge had been of counsel, and was, therefore disqualified to sit in the case, a change of venue was by said court awarded to Scott, which was the nearest adjoining county in said circuit.

At the October term, 1889, of Scott county, defendant filed a motion to dismiss said cause, for the reason that the circuit court of Scott county had no jurisdiction of said cause, which motion was by said court overruled; but the court, holding that the said cause had been improperly sent to Scott county, ordered it stricken from the docket and the papers returned to the said common pleas court.

At the January term, 1890, of the said common pleas court, said court holding that it had no further jurisdiction of said cause, ordered the papers to be returned to said circuit court of Scott county.

At the April term, 1890, of said circuit court of Scott county, defendant again appeared, and, "limiting its appearance to the purposes of its motion," etc., moved the court to dismiss said cause, for the reason that it had no jurisdiction of said cause, which motion was sustained and the case dismissed. Thereupon the relator moved the court to vacate said order, and reinstate said cause, which motion was overruled.

Upon the foregoing facts which stand admitted by the return, the question is presented, whether we should compel the judge of the Scott circuit court to reinstate upon the docket of said court the cause thus dismissed.

After reading the statutory provisions we have no doubt whatever of the correctness of the action of the court of common pleas in awarding a change of venue to the Scott circuit court. Two grounds were urged in the application made: First, prejudice of the inhabitants of Cape Girardeau county; second, disqualification of the judge of the common pleas court owing to his having been of counsel. The second application having been made, pending the first, both may be regarded as but one application based upon two grounds, and was no doubt so intended; if not, the first application should have been in terms and should have been formally withdrawn.

Under the plain provisions of the amendatory act of 1861, it would have been but a trifling with the administration of justice to have sent the cause to the circuit court of Cape Girardeau county, in the face of the defendant's affidavit that the inhabitants of the entire county were prejudiced against it. What relief would this have been against the alleged prejudice?

It has been urged that inasmuch as the Scott circuit court had

made its final order remanding the cause to the common pleas court, and inasmuch as the latter court, after this was done, simply made its order directing the return of the papers to the Scott circuit court, that therefore the latter court is not vested with jurisdiction to try the cause, etc. To this objection it may be answered that the order made by the Scott circuit court as aforesaid was *coram non judice*. That court had no more authority under the law and the facts to make such an order than it would have had to have sent the cause to the circuit court of Mississippi county. Such orders are nullities and consequently oppose no barrier to a correct method of procedure when the error complained of has been ascertained. *State v. Gabriel*, 88 Mo. 631. Nor is it any obstacle to the obtaining of the proper relief here, because the lower court has acted. *Bayha's case*, 97 Mo. 331, and cases cited.

Nor would an appeal or writ of error afford any substantial or effectual remedy in a case of this sort. Were an appeal taken in an instance like the present, there would be nothing to pass upon, no errors to correct; for no trial had occurred. It is not the intention of the law to allow a case to be bandied about like a shuttle cock from court to court without affording a more effective and prompt relief than would be afforded by an appeal or writ of error.

The premises considered, we do not doubt that this is an appropriate occasion for the exercise of our supervisory control and mandatory authority and consequently we issue our peremptory writ. All concur.

Separate opinion:

BARCLAY, J.—Under the statutes governing this case, fully set forth in the foregoing opinion, it appears to me that the learned judge of the Scott circuit court was in error in refusing to take jurisdiction of the cause referred to. While the plaintiff therein might properly have resorted to a writ of error or an appeal to rectify that ruling, it seems to me that he was not necessarily bound to do so.

Under the constitution of this State, giving the supreme court a "general superintending control" over the trial courts (Const. 1875, art. 6, § 3), it is within the proper scope of the constitutional authority of this court to intervene by the writ of mandamus to reinstate a case which has been erroneously stricken from the docket at the circuit, and in which a hearing is absolutely denied. In such a case we think the party injured should not be put to the delay of an appeal. The case in question as it stood in the trial court when stricken out, involved a greater sum than \$2,500.00, and hence was within the final reviewing power of this court. It is unnecessary, therefore, to now consider whether we ought to entertain the application if the amount were less than the pecuniary limit of the jurisdiction of this court, defined by the constitution, art. 6, § 12.

For these reasons the writ should go.

4. To compel a change of venue.—(a) General rule.

STATE EX REL. JOHNSON v. WASHBURN.

1867. SUPREME COURT OF WISCONSIN. 22 Wis. 99.

COLE, J. This was a rule directed to the circuit judge of the tenth circuit, requiring him to appear and show cause why a peremptory writ of mandamus should not be issued, commanding him to enter an order changing the place of trial in an action therein mentioned. It appears from the papers upon which the rule was granted, that an action for the recovery of money was commenced in the circuit court of Oconto county against the relators. The relators are all residents of Milwaukee county, and service was had upon them in that county. Before the time for answering expired, the defendants demanded in writing that the trial be had in the county in which they resided. The plaintiff refusing to consent to a change of the place of the trial, application was duly made to the circuit court for an order changing the place of trial to Milwaukee county. This application was denied by the circuit court, on the ground and for the reason stated by the judge in the answer to the rule to show cause, that it appeared that all the transactions out of which the cause of action occurred arose in Oconto county, and that the convenience of all the plaintiff's witnesses, and probably of the defendant's witnesses, as well as the ends of justice, would be best promoted by retaining the cause in Oconto county for trial.

Whether the circuit court was right in refusing to change the place of trial on these grounds, and in the view which it took of the various provisions of chap. 123, Rev. Stat., is a point we shall not attempt to decide upon this application. We shall assume, however, for the purposes of this application, that the defendants were entitled under the circumstances, to have the place of trial changed to Milwaukee county, where they resided. And then the question arises, whether this court should grant a writ of mandamus commanding the judge to change the place of trial? It is objected that the order denying the motion changing the place of trial is appealable, and that the remedy by mandamus is not proper. We think this position is sound, and that it furnishes a most conclusive reason for denying this application. In *Bank v. Tallman*, 15 Wis. 92, an order refusing to change the place of trial on account of the prejudice of the judge, was held to be an appealable order. See also *Oatman v. Bond*, 15 Wis. 20; *Foster v. Bacon*, 9 *id.* 345; *Supervisors v. Supervisors*, 20 *id.*, 139. It is true, in the case of the *State v. McArthur*, 13 Wis. 407, this court granted a writ of mandamus commanding the circuit judge to change the place of trial; but the question was not fully considered by the court, or argued by the counsel, and we are satisfied that the prac-

tice there adopted was wrong, and should not be followed. And because an order improperly refusing to change the place of trial is an appealable order, we deny the application for the writ in this case.

BY THE COURT.—Motion for a peremptory writ of mandamus denied.

In accord.—San Joaquin county v. Superior Court, 98 Cal. 602, 33 Pac. 482; People v. Clerk of Dist. Ct., etc., 22 Colo. 280, 44 Pac. 506; State v. Cotton, 33 Neb. 560, 50 N. W. 688; State v. Wolfe, 2 Ohio Dec. 245.

(b) *Contra.*

STATE EX REL. WEDEKING v. McCRACKEN.

1894. COURT OF APPEALS OF MISSOURI. 60 Mo. App. 650.

GILL, J. In January, 1894, the relator Wedeking, was defendant in a suit pending before the appellant; McCracken, a justice of the peace. On the day the cause was set for trial, Wedeking filed his application and affidavit for a change of venue. The justice refused to award the change of venue, unless Wedeking would prepay the justice's costs for making the same, which relator declined to do. Thereupon Wedeking brought mandamus in the circuit court to compel the justice to grant the change of venue. On the trial of the cause, the court awarded a peremptory writ, and from this judgment justice McCracken has appealed.

I. The first contention is that mandamus will not lie in a case of this nature. The point must be ruled against the appellant. We shall assume, in the absence of a contrary showing, that the relator filed with the justice the affidavit required by the statute. The duty then devolved on the justice to change the venue of the case. The statute provides that, "either party shall be entitled to a change of venue in any civil cause pending before a justice of the peace, if he shall before the jury is sworn, or the trial is commenced before the justice, file an affidavit," stating that the justice is a material witness, or is prejudiced, etc. (6240, Rev. Stat. 1889), and "upon the filing of the affidavit in due time, the justice must allow the change of venue and note the same on his docket, and immediately transmit all the original papers and a transcript of his docket entries in the case, to some convenient justice," etc., provided that when such affidavit for a change of venue shall be filed, the justice shall have no further jurisdiction in the cause, except to grant such change of venue." R. S. sec. 6241. This proviso was added to the law by the revision of 1889.

Construing the foregoing statute (without the above quoted proviso added by the amendment of 1889), this court has decided, that the justice, in the matter of a change of venue on an affidavit duly filed, was bound under the command of a specific ministerial duty to award the change; that the justice had therein no judicial discretion, but there devolved on the officer the duty to perform an act purely ministerial, in its nature, and, to secure the performance thereof, mandamus would lie. *State v. Clayton*, 34 Mo. App. 563. The reason for such holding is fully set forth in the opinion of Smith, P. J., and to which we adhere.

But it seems to be contended by the appellant that a change in the law (as announced in *Loyd v. Clayton*, supra,) has occurred by reason of the amendment of 1889. As already stated, section 6241, was, at that time, amended by adding the proviso, "that when such affidavit for change of venue shall be filed, the justice shall have no further jurisdiction in the cause, except to grant such change of venue." Now it is claimed that if the justice shall, notwithstanding the affidavit therefor, decline to change the venue and proceed to render a judgment against the applicant, then such judgment shall be void and the matter is an error that may be corrected on appeal to the circuit court; and if correctible by appeal, then, since there is a specific legal remedy, mandamus will not lie.

We must, of course, concede the correctness of the rule that mandamus is an extraordinary remedy to be invoked only in the absence of another. The writ is issued only as *dernier ressort* only when all other remedies fail, and then to prevent a failure of justice. But, "such other remedy must be adequate. Such remedy is adequate when it reaches the end intended, and actually compels the performance of the duty which has been neglected or refused. It must apply to the case, and afford the particular right to which the party is entitled. Anything which falls short of this, is not an adequate remedy." Merrill on Mandamus, § 53.

Now it is the specific legal right of a party to a cause pending in a justice's court, to have his case tried and determined; and, if dissatisfied with the justice before whom it is pending, the litigant has the right, on filing the necessary affidavit, to have the cause removed to another justice to have the cause heard and determined. If the justice should deny his application for removal and should proceed to try and determine the cause, then, under the amendment of 1889, such proceeding by the justice is *coram non jure* null and void for want of jurisdiction. And, if then the cause should be appealed to the circuit court, it would there be dismissed for the want of jurisdiction in the justice who tried the cause. For

the rule is well settled that the circuit court, to which a case has been appealed from a justice of the peace, will not acquire jurisdiction unless the justice had jurisdiction. The jurisdiction of the said appellate court is said to be derived from that of the justice. *Cooper v. Barker*, 33 Mo. App. 181.

Clearly then the litigant who may be denied a change of venue before the justice has no adequate remedy by appeal to the circuit court. He will as it were, be "hung up" between the two courts—the justice refusing to transfer, and the circuit court refusing to take jurisdiction. This, then, must be regarded as a clear case for the writ of mandamus.

Judgment of the circuit court affirmed.

5. Vacating judgment or order and enforcing same.

SHERWOOD v. IONIA CIRCUIT JUDGE.

1895. SUPREME COURT OF MICHIGAN. 105 Mich. 540, 63 N. W. 509.

PETITION by Josiah W. Sherwood and another directed to the Ionia circuit judge to compel the vacation of an order.

Relators are the owners of 160 acres of land. Upon 100 acres was a mortgage for \$5,500.00, and upon the 60 acres one of about \$2,000.00. They borrowed of one Vincent, \$7,000.00 for the purpose of paying off these mortgages, securing this loan by a mortgage on the same property. Sherwood agreed to pay the other \$500 so as to leave Vincent's mortgage the first mortgage lien. Relators claim that they agreed with Vincent that they might cut and remove sufficient timber to pay the remaining \$500 due upon the mortgage. Vincent denies such an agreement, and claims that Mr. Sherwood told him that he had debts due him which he could collect and pay the other \$500. Subsequently Sherwood induced one Hawley to indorse two notes for him aggregating \$500, for the purpose of paying this deficiency, and gave a chattel mortgage to Hawley. Sherwood insists that at this time he made an agreement with one Temple, the agent of Vincent, permitting him to cut and remove the timber, and that this chattel mortgage was given to Hawley as security for the payment of the money realized from the sale of the timber, upon the Hawley notes. The timber was situ-

ated upon the 60 acre tract. Sherwood began to cut and remove the timber, whereupon the first mortgagee obtained an injunction preventing it. Vincent also, learning that Sherwood had erected a mill upon the land, and was cutting and removing the timber, filed his bill and obtained an injunction. Hawley afterwards filed a petition to so modify the injunctions as to permit timber to be cut sufficient to pay the notes which he signed with Sherwood. Vincent also filed a petition praying that Hawley be ordered to exhaust his chattel mortgage security, and that he be subrogated to the rights of Hawley under said chattel mortgage. After hearing these petitions, the court, on September 14, 1894, entered an order denying to modify the injunction or to direct Hawley to proceed to sell and dispose of the property under the chattel mortgage, but directing that said Vincent be subrogated to all the rights of said Hawley under and by virtue of his chattel mortgage and the notes secured thereby; that Hawley be directed to assign them upon demand to Vincent; and that upon said assignment, Vincent be empowered and authorized to sell sufficient of the property to satisfy the expenses of sale and the amount due on the notes and to release Hawley from liability in so far as the amount realized should pay the notes. Subsequently the relators filed a petition to vacate the above order. This the court denied, and the purpose of this petition is to secure the writ of mandamus to compel the respondent to vacate the order.

GRANT, J. (after stating the facts).—It appears that a large amount of testimony was taken upon the various issues involved in these petitions, and the court found that no agreement to permit Sherwood to cut the timber was made between him and Vincent, and that Vincent had no knowledge of any such arrangement made between Sherwood, Hawley and Temple, and that Temple had no authority to make such arrangement. He further found that the chattel mortgage was given to indemnify Hawley against loss for the payment of the notes, and not for loss from misappropriating the proceeds from the sale of the timber, and failing to apply them as agreed. This appears to be an attempt to obtain a decision upon the merits in a chancery case by mandamus rather than by appeal. The facts are all found against the relators. If the evidence justifies the facts, the order of the court is right. Mandamus is not the proper remedy to review such an order. Appeal is the only proper remedy. The issuance and retention of the injunction were within the discretion of the respondent, and, under the facts as he found them, he not only did not abuse his discretion, but was fully justified in both granting and retaining the injunction. This case well illustrates both the inconvenience and the impro-

priety of the attempt to review such cases in this manner. The papers presented for our examination, including the testimony, cover nearly 200 pages of typewritten matter. The writ is denied with costs. The other justices concurred.

COMPTON v. AIRIAL.

1854. SUPREME COURT OF LOUISIANA. 9 La. An. 496.

BUCHANON, J.—Plaintiff appeals from the refusal of the district judge to grant a peremptory mandamus upon the clerk of the district court, commanding him to issue a *fiery facias* for arrears of alimony exceeding \$300, due under an interlocutory decree in a suit pending in said court, between the plaintiff and her husband.

It is for the court which rendered the judgment to regulate the manner of its execution (C. P. 629); and we are indisposed to interfere with this legal prerogative of the court of the first instance, unless the record shows a clear case of denial of justice or of oppression.

We do not think that the petition shows a case for mandamus. Of the right of the party to enforce the decree for alimony rendered in her favor, there can be no question. But we consider the correct practice to be, that the party should address himself to the court that made the decree, and make some showing, by affidavit, or otherwise, that the defendant has refused to obey the same. Thereupon the court may in its discretion, properly render an execution for the arrears of alimony unpaid. That order would be a guide to the clerk in issuing a *fiery facias*, which writ must necessarily express some definite sum (C. P. 641). In the present case, there is no allegation of any demand and refusal to comply with the decree of alimony; nor for any application to the court for an order for a *fiery facias*; nor of any default of the clerk, to fulfill a duty attached to his office, and which might legally be required of him (C. P. 834).

The clerk is a ministerial, not a judicial officer. The application made to him by the plaintiff, was for a *fiery facias*, for the sum of \$360, in execution of the decree for alimony for payment at the rate of \$20 per month. It was not competent for the clerk to assume, *proprio motu*, or to decide that there was an accumulation of arrears of alimony unpaid, although due under this decree, to the extent of \$360. This was a matter for the cognizance of the judge.

Judgment affirmed.

Vacating judgment. See *Ex parte* Hoyt, 13 Pet. 279; *Ex parte* Washington, etc., R. Co., 140 U. S. 91, 11 Sup. Ct. Rep. 673; *Ex parte* Hayes, 92 Ala. 120, 9 So. 156; Barksdale v. Cobb, 16 Ga. 13; State v. Neville, 110 Mo. 345, 19 S. W. 491; People v. Oneida Common Pleas, 21 Wend. 20; State v. Taylor, 19 Wis. 566; Rohmeister v. Bannon, 15 Ky. Law Rep. 114.

Enforcing judgment. See Cummins v. Webb, 4 Ark. 229; Pickell v. Owen, 66 Ia. 485, 24 N. W. 8; State v. Holmes, 38 Neb. 355, 56 N. W. 979.

6. Compelling allowance of appeal.

GRESHAM v. PYRON.

1855. SUPREME COURT OF GEORGIA. 17 Ga. 263.

LEWIS PYRON, claiming to be a creditor of Jacob Stroman, deceased obtained temporary letters of administration upon his estate. He and William Mitchell, (who also was a creditor), both advertised for permanent letters. At the hearing the Ordinary granted the letters to William Mitchell and revoked the temporary letters to Pyron, as having expired by their own limitation—Pyron making no objection thereto within four days. Pyron appealed from the grant of the permanent letters to Mitchell. Letters *pendente lite* were then granted to Mitchell. From the grant of letters *pendente lite*, Pyron offered to appeal also. The Ordinary refused to grant an appeal from this grant of letters. Pyron moved a rule v. the Ordinary in the superior court, to show cause why he should not enter the appeal, *nunc pro tunc*. This rule was resisted, first, because the proper mode to proceed was by mandamus, and second, because upon the above facts as stated by the Ordinary, in his return to the rule, an appeal did not lie.

By the court,—STARNES, J., delivering the opinion.

(1.) It is insisted that the Ordinary was right in refusing the appeal, because it was proposed to be taken from a decision declining to grant letters *pendente lite*. The law authorizes an appeal from "any decision" of the Ordinary. It is impossible to say that this is not a decision. There can be no reason given why it is not a decision as much as the refusal of permanent letters.

The only reason assigned why there is a difference, was, that if appeals from a refusal to grant letters, pending the appeal from the grant of permanent letters, were allowed, it would be productive of great inconvenience, as there would then be no one to take charge of and manage the estate. This does not necessarily follow, for

the Ordinary might appoint, again, someone as temporary administrator, pending the last appeal and so on until an administrator was found.

If it be answered that this might not be practicable, as the appeal from the refusal to grant letters *pendente lite* might not be entered until the court was adjourned, the reply to that is, that this observation applies as well to the appeal in the first instance; and in such case, the supposed inconvenience would not be obviated; for letters *pendente lite* could not be granted out of the term, as the law requires them to be granted by the court.

But it is well known that the *argumentum ab inconvenienti* is legitimate only where the court is doubtful as to the law. Where that is clear, the court must administer it, whatever the inconvenience.

The Ordinary, however, in such a case as that supposed, has a general authority in the premises, by which he can to a great extent, remedy such an inconvenience.

(2.) The inconvenience in question need not arise again, for another reason. By the amendment of the constitution creating the office of Ordinary, that officer is empowered to "grant temporary letters of administration, to hold until permanent letters are granted." When, therefore, a temporary administrator is appointed, he may retain his office until the appeal from the grant of permanent letters, is finally tried and determined, and these letters granted. In this case, Lewis Pryon, the temporary administrator, might have continued (in our opinion) to exercise his authority until the appeal was disposed of, if he had not acquiesced in the revocation of his temporary letters.

We are well satisfied, that the defendant in error was entitled to his appeal.

(3.) Let us now ascertain, whether or not, he has pursued the proper remedy to secure it. Can an inferior judicature, in this state be reached, and its errors or its refusal to administer the law, be corrected by a proceeding in the form of a rule issued by the superior court?

By our system, what are technically known as errors of inferior courts, committed judicially in the administration of justice, must be corrected by the superior court, either by appeal or by *certiorari*. And the errors which are to be thus corrected, are such as occur after a case of some sort is before the inferior tribunal. But here the complaint is, that the Ordinary would not permit the case to get its lodgment in court. He refused to allow an appeal; he refused to do that ministerial act necessary to give that party desiring an appeal a standing in court, and to which he was entitled as a matter of right.

It was not a judicial error to be corrected, but a ministerial

act to be performed by the Ordinary, which he refused, and thereby occasioned a failure of justice.

To correct a failure of justice by reason of such refusal, mandamus is the proper remedy in our opinion.

It was urged that as the defendant in error, was entitled to appeal, as a matter of right, the superior court might order such appeal *nunc pro tunc*. This is true; but it must be done by the proper remedy.

We do not see that this case differs, in principle, from that where the clerk of the superior court refuses to send up a bill of exceptions to this court, after there has been a compliance with the law; or where the clerk refuses to receive a petition and annex process. They stand upon the same basis of reasoning.

The decisions cited by the counsel for the defendant in error are all cases where the cause had a lodgment in court; where the ministerial act necessary to place the cause there had been performed; but there was some irregularity or informality in the proceeding.

Let the judgment be reversed.

STATE EX REL. WHEELER v. MCAULIFFE.

1871. SUPREME COURT OF MISSOURI. 48 Mo. 112.

WAGNER, J., delivered the opinion of the court.

The relators filed their petition in the circuit court, praying that a mandamus might issue against the respondent, who was a justice of the peace in St. Louis county, to compel him to grant an appeal in certain cases that had been decided by him, and in which the relators were parties. Respondent answered and upon the trial of the issues of fact a verdict was rendered for the relators, upon which judgment was entered. Respondent then filed his motion in arrest of judgment, for the following reasons: First, that the pleadings and alternative writ issued herein do not disclose any case authorizing the court to issue a writ of mandamus; second, that on the pleadings of the relators, it appears that they have mistaken the remedy which the law has given them in a case of the kind stated in the pleadings; third, that the circuit court can only compel a justice of the peace to allow an appeal by rule and attachment, and not by the writ of mandamus.

The motion in arrest was overruled, and the respondent appealed to the general term, where the judgment at special term was reversed, and the relators have brought the case here.

If it can be found that mandamus is not maintainable in a case like this, it will be unnecessary to examine the other points raised. The principle is unquestioned, laid down by the text writers and established by the adjudged cases, that mandamus will lie only where the relator has a specific right and the law has provided no other specific remedy. *County v. Court*, 23 Mo. 449; *State v. Court*, 41 Mo. 225.

The petitioner here by complying with the law, had the right to have his appeal allowed. But has the law provided him with no other remedy than a resort to this extraordinary process? By the statute it has provided that "if the justice fail to allow the appeal in the case where it ought to be allowed, or if, by absence, sickness or any other cause, on his part, an appeal cannot be taken in time, the circuit court, or any other court having jurisdiction of such appeals, on such fact satisfactorily appearing, may by rule and attachment compel the justice to allow the same and to return his proceedings in the suit, together with the papers required to be returned by him," 2 Wag. Stat. 849, § 10.

Here the law has plainly and clearly pointed out a specific remedy to be pursued on such occasions. By the summary proceeding of rule and attachment the object is attained, and there is no necessity for invoking the assistance of this writ. There was, therefore, no reason for this proceeding, and the judgment at General Term should be affirmed. The other judges concur.

(See § 4065 of the Rev. Stat. of Mo. 1899.)

See also, *Pettigrew v. Washington Co.*, 43 Ark. 33; *Trustees Wabash & Erie Canal v. Johnson*, 2 Ind. 219; *Kelley v. Toney*, 95 Ky. 338, 25 S. W. 264; *State v. City of Baton Rouge*, 34 La. Ann. 212; *State v. Allen*, 92 Mo. 20, 4 S. W. 414; *Ex parte Morris*, 11 Grat. (Va.) 292.

But see *Smith v. Reilly*, 82 Mich. 93, 45 N. W. 1122.

In Michigan and Alabamá, Mandamus was formerly employed with great liberality as a remedy to correct errors of an inferior tribunal. Later decisions in these states have, however, gone far to produce a harmony with what is clearly the prevailing view, *i. e.*, that Mandamus will not lie where there is a remedy existing by writ of error or by appeal or the statute provides some specific remedy for correcting the errors of inferior tribunals.

7. Compelling court to sign bill of exceptions or to amend same according to the truth in the cause.

SIKES v. RANSOM.

1810. SUPREME COURT OF NEW YORK. 6 John (N. Y.) 279.

THIS was an application to the court, for a mandamus to the judges of the Otsego Common Pleas, to amend a bill of exceptions, according to the truth of the case.

By the court:—

The application is entirely new; and it becomes a question whether this court can interfere when a court below refuses to seal a bill of exceptions. The books do not furnish much light on this subject. The practice, in England, under the statute of West 2, (of which ours is a copy), seems to be, to apply to the court of chancery, for a writ grounded upon the statute. The form of the writ is to be found in the Register; (182 a.) and Lord Redesdale, in the case of *Lessees v. Murray*, 1 Sch. and Lef. 75, calls it a mandatory writ, "a sort of prerogative writ;" that the judges to whom it is directed, must obey the writ, by sealing the exceptions, or making a special return to the king in chancery. The writ after citing the complaint, commands the judges *si ita est, tunc sigilla vestra, etc., et hoc sub periculo quod incumbit nullatenus omittatis*. What that peril is, within the purview of the writ, does not distinctly appear; though the books speak of an action on the statute, at the instance of the party aggrieved (Shower's P. C. 117). In the *Rioter's* case (1 Vern. 175 Ch.) a precedent was produced where, in a like case, such a mandatory writ had issued out of chancery, to the judge of the sheriff's court in London. But, though no instance, appears, of such a writ issuing out of the King's Bench when an inferior court refused to seal a bill of exceptions, there is no case denying to that court the power to award the writ. It is, in effect, a writ of mandamus and it is so termed in the books, Bacon Abr. tit. Mandamus, E. A mandamus is a prerogative writ. It ought to be used where the law has established no specific remedy; and, where in justice and good government, there ought to be one. Why cannot the writ in question issue from this court? We have the general superintendence of all inferior courts; and are bound to enforce obedience to the statutes, and oblige subordinate courts and magistrates to do those legal acts which it is their duty to do. The mandamus, as was observed in the case of *King v. Barker*, 3 Burr. (K. B.) 1265, has, within the last century, been liberally interposed, for the benefit of the subject, and the advancement of justice.

There is no reason why the awarding of this particular writ does not fall within the jurisdiction of this court, or why it should be exclusively confined to the court of chancery. It would be equally in the alternative, *quod si ita est*, to seal the bill of exceptions; and if it be returned *quod non ita est*, the answer would be sufficient; and the party, if aggrieved, would be put to his action for a false return. If complaint should be made against this court, or one of the judges for refusing to seal a bill of exceptions, then the writ must *ex necessitate*, come from chancery if anywhere; but in no other case can it be indispensable.

But, though the court are of the opinion that they have jurisdiction in this case; yet there does not appear to be sufficient ground disclosed to justify their interference. The bill was tendered and sealed at the last January term of the Otsego Common Pleas; and at the last June term, the judges were asked to amend the bill, according to a statement of facts presented. Some of the judges recollected the facts; some of them did not. Regularly a bill of exceptions ought to be tendered at the trial, though the practice is, to allow the counsel to tender it afterwards, 1 Bos. & Pul. (C. P.) 32. But according to the decision in Wright v. Sharp, 1 Salk. (K. B.) 288, the courts are not bound to seal a bill of exceptions tendered at the succeeding term of court; for as Lord Holt observed, "if this practice should prevail, the judge would be in a strange condition. He forgets the exception and refuses to sign the bill, so an action must be brought." The counsel should have attended to the bill, and have seen that it was correct at the January term. It would be a dangerous precedent to take compulsory measures against the judges, and make them answer, at their peril, to a statement of facts tendered to them at a subsequent term.

The motion is therefore denied.

Motion denied.

EX PARTE CRANE ET AL.

1831. SUPREME COURT OF THE UNITED STATES. 5 Pet. (U. S.) 190.

MARSHALL, C. J., delivered the opinion of the court.

These suits were decided in the court of the United States for the second circuit and southern district of New York, in May Term, 1830. At the trial the court gave opinions on several points of law, which were noted at the time, and a right to except to them reserved. According to the practice in New York, bills

of exception were prepared by counsel in vacation, and tendered to the circuit judge for his signature. The bills comprehend not only the points of law made at the trial, but the entire charge to the jury. The judge corrected the bill by striking out his charge to the jury. This motion is made for a writ of mandamus, "to be directed to the circuit court of the United States for the southern district of New York in the second circuit, commanding the said circuit court to review its settlement of the proposed bill of exceptions," "and to correct, settle, allow, and insert in the said bill, the charge delivered to the jury in each case, or the substance thereof."

A doubt has been suggested respecting the power of the court to issue this writ. The question was not discussed at the bar, but has been considered by the judges. It is proper that it should be settled, and the opinion of the court announced. We have determined that the power exists. Without going extensively into this subject, we think it proper to state briefly the foundation of our opinion.

In England, the writ of mandamus is defined to be a command issuing in the King's name, from the court of King's Bench, and directed to any person, corporation, or inferior court of judicature within the king's dominions, requiring them to some particular thing therein specified, which appertains to their office and duty, and which the court of King's Bench had previously determined, or at least supposes to be consonant to right and justice. Blackstone adds, "that it issues to the judges of inferior courts, commanding them to do justice according to the power of their office, whenever the same is delayed. For it is the peculiar business of the court of King's Bench to superintend all other inferior tribunals, and therein to enforce the exercise of those judicial or ministerial powers with which the crown or legislature have invested them, and this, not only by restraining their excesses, but also by quickening their negligence, and obviating their denial of justice," 3 Blackstone Comm. 110.

It is, we think apparent that this definition and this description of the purposes to which it is applicable by the court of King's Bench, as supervising the conduct of all inferior tribunals, extends to the case of a refusal by an inferior court to sign a bill of exceptions, when it is an act which "appertains to their office and duty," and which the court of King's Bench supposes "to be consonant to right and justice." Yet we do not find a case in which the writ has issued from that court. It has rarely issued from any court, but there are instances where it has been sued out of the court of chancery, and its form is given in the

register. It is a mandatory writ commanding the judge to seal it, if the fact be truly stated: *si ita est*.

There is some difficulty in accounting for the fact that no mandamus has ever issued from the court of king's bench, directing the justice of an inferior court to sign a bill of exceptions. As the court of chancery was the great *officina brevium* of the kingdom, and the language of the statute of Westminster the second was understood as requiring the king's writ to the justice, the application to that court for the writ might be supposed proper. In 1 Sch. & Lef. 75, the chancellor superseded a writ which had been issued by the cursitor, on application, declaring that it could only be issued on the order of the court. He appears, however, to have entertained no doubt of his power to award the writ on motion. Although the course seems to have been to apply to the chancellor, it has never been determined that a mandamus to sign a bill of exceptions may not be granted by the court of king's bench.

It is said by counsel in argument in *Bridgman v. Holt*, Shower's P. C. 122, that by the statute of Westminster the second, chap. 31, in case the judge refuses, then a writ to command him, to issue out of chancery, *quod apponat sigillum. suum*. The party aggrieved by denial may have a writ upon the statute commanding the same to be done, etc. That the law is thus seems plain, though no precedent can be shown for such a writ; it is only for this reason, for no judge ever refused to seal a bill of exceptions; and none was ever refused, because none was ever tendered like this, so artificial and groundless."

The Judicial Act, 13, enacts, that the supreme court shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding offices under the authority of the United States. A mandamus to an officer is held to be the exercise of original jurisdiction; but a mandamus to an inferior court of the United States, is in the nature of appellate jurisdiction. A bill of exceptions is the mode of placing the law of the case on the record, which is to be brought before this court by the writ of error.

That a writ of mandamus to sign a bill of exceptions is "warranted by the principles and usages of law," is, we think satisfactorily proved by the fact that in England it is given by statute; for the writ given by the statute of Westminster the second, is so in fact, and is so termed by the books. The Judicial Act speaks of the usages of law generally, not merely of common law. In England, it is awarded by the chancellor; but in the United States, it is conferred expressly on this court,

which exercises both common law and chancery powers, is invested with appellate power, and exercises extensive control over all the courts of the United States. We cannot perceive a reason why the single case of a refusal by an inferior court to sign a bill of exceptions, and thus to place the law of the case on the record, should be withdrawn from that general power to issue writs of mandamus to inferior tribunals which is conferred by statute.

In New York, where a statute exists similar to that of Westminster, the second, an application was made to the supreme court for a mandamus to an inferior court, to amend a bill of exceptions according to the truth of the case. The court treated the special writ given by the statute as a mandamus, and declared that it was so considered in England; and added that "though no instance appears of such a writ issuing out of the court of king's bench, where an inferior court refuses to seal a bill of exceptions, there is no case denying to that court the power to award the writ." "It ought to be used where the law has established no specific remedy, and where in justice and good government there ought to be one." "There is no reason why the awarding of this writ does not fall within the power of this court, or why it should be exclusively confined to the court of chancery."

In the opinion, then, of the very respectable court which decided the motion made for a mandamus in the case of *Sikes v. Ransom*, 6 Johns. 279, the supreme court of New York possesses the power to issue this writ in virtue of its general superintendence of inferior tribunals. The judicial act confers the power exclusively on this court. No other tribunal exists by which it can be exercised.

(The court held, however, that the practice of spreading the whole charge of the lower court on the record, and excepting thereto, was improper, and a judge should not be compelled to sign such a bill of exceptions. BALDWIN, J., delivered an elaborate dissenting opinion.)

See also *Briscoe v. Ward*, 1 Har. & J. (Md.) 165; *State v. Judge of the Eighth Dist. Ct.*, 35 La. Ann. 248; *People v. Judge*, 41 Mich. 726, 49 N. W. 925; *State v. Hawes*, 43 Ohio State, 16; *Reichenback v. Ruddach*, 121 Pa. St. 18, 15 Atl. 488; *Swartz v. Nash*, 45 Kan. 341; *Flagg v. Peterbaugh*, 101 Cal. 583, 36 Pac. 95; *State v. Hall*, 3 Cold. (Tenn.) 255; *Cha-teaugay O. & I. Co., Petitioner*, 128 U. S. 544, 9 Sup. Ct. Rep.; *Whipple v. Hopkins*, 119 Cal. 349, 51 Pac. 535; *People v. Gibbons*, 54 Ill. App. 617; *Jelley v. Roberts*, 50 Ind. 1; *State v. Ramsey*, 59 Neb. 518, 81 N. W. 439; *Che Gong v. Stearns*, 16 Ore. 219, 17 Pac. 871; *Osborne v. Prather*, 83 Tex. 208, 18 S. W. 613; *Dillard v. Dunlop*, 83 Va. 755, 3 S. E. 383; *State v. Clough*, 69 Wis. 369, 34 N. W. 399.

8. To set courts in motion but not interfere with their discretion.

JAMES TURNER, IN RE.

1832. SUPREME COURT OF OHIO. 5 Ohio 542.

JUDGE LANE delivered the opinion of the court.

In the court of the common pleas, March term, 1832, James Turner was indicted for murder. On his arraignment it was demanded of him in which court he elected to be tried, to which demand he stood mute. Upon which, the court, "having advised upon the matter of the prisoner's standing mute, when interrogated as to whether he elected to be tried in the supreme court, upon the indictment found this term, is of the opinion that the court has no jurisdiction of the case, because upon a former indictment for the same cause, the same prisoner elected to be tried in the supreme court, and because the same indictment is still pending and undetermined." Upon this, Mr. Hunter, the prosecuting attorney, at the November term of the supreme court of Fairchild county, moves the court for a mandamus, commanding the judges to proceed in this cause, in such manner that the defendant may be brought to trial, in due course of law.

By section 3 of the act to organize judicial courts, power is given to the supreme court to issue the writ of mandamus, and all other writs not specially provided for, to enforce the due administration of right and justice throughout the state. The occasions upon which the writ is to issue are not pointed out, and it is not necessary to recur to the common law, to learn in what cases the writ is applicable.

"The original nature of the writ," as is said in 3 Burr. (K. B.) 1267, "and the end for which it was formed, direct upon what occasions it shall be used. It was introduced to prevent disorder, from a failure of justice, or a defect of police; therefore it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one." It has become an established remedy, is a matter of every day's use, to compel courts and magistrates to execute their official duties.

The most usual object sought by this writ is to exact the execution of some official duty from a ministerial officer; but it is equally applicable to compel courts to do that justice which the law enjoins them to administer. Whenever an inferior court refuses to exercise its jurisdiction, the writ of mandamus is the appropriate remedy. Examples are numerous in the books, in

which this power has been exercised. It has been issued to the quarter sessions, to compel them to give judgment for abating a nuisance. *Andrews* 188. To command them to receive an appeal. *Sessions cases* 248. To the court of Sandwich, to give judgment, in an action of assault and battery, *Stra. (K. B.)* 113. To a sheriff's court, to give judgment in a writ of inquiry, *Stra. (K. B.)* 392. To the bailiffs of Andover, to give judgment in a depending case. 2 *Barn.* 259. It has been issued by the Supreme court of New York, to the sessions, to compel them to give judgment. 1 *Johns. Cas. (N. Y.)* 279. To the court of common pleas, to compel them to enter judgment. 1 *Johns. Cas. (N. Y.)* 181; 2 *Johns. Cas. (N. Y.)* 215, 371; 19 *Johns. (N. Y.)* 147. It has been granted in Massachusetts, to compel the court of sessions to enter the verdict of a jury in the assessment of damages. 9 *Mass.* 383; 5 *Mass.* 435. And it has been issued from the supreme court of the United States to a district judge, to compel him to execute his sentence. 6 *Cranch (U. S.)* 115. In short, as said by Chief Justice Parker, of Massachusetts, 2 *Pick. (Mass.)* 414, by this process, the superintending court can compel the performance of duty by all the inferior courts, whether that duty be ministerial or judicial.

These authorities leave no doubt that the writ may issue, commanding the court to act; but care is to be taken that it shall not interfere with the full and legitimate exercise of judgment in the court to which it is directed. It is not a remedy adapted to correct errors, or to constrain them to act in a particular manner; although it may compel a judge to proceed to judgment, it will not prescribe what judgment to give. 3 *Dall. (U. S.)* 45. In all these cases, the full object of the writ is obtained, if it produces the action, and calls forth the exercise of jurisdiction.

In the present case, the prisoner while arraigned on an indictment before the court of common pleas, stood mute. Instead of instituting an inquiry into the cause of his refusal, as the law directs, the court, without plea from the defendant, and without affording the attorney for the state an opportunity of contesting the position, assumed the fact that another indictment was pending in this court for the same offense, and that the pendency of it destroyed their jurisdiction. If they had gone further, and quashed the indictment for the want of jurisdiction, perhaps this might have been the exercise of such a judicial discretion, as would have been beyond the reach of their power. But this was not done; the court abstained altogether from doing anything, and a failure of justice is likely to arise from their want of action. We unite in the opinion that this is a proper case for mandamus.

The first process in that case must be a rule to show cause.

See also *Ex parte* Loring, 94 U. S. 418; *United States v. Seaman*, 17 Howard (U. S.) 225; *State v. St. Louis Ct. of Appeals*, 87 Mo. 374; *People v. Ct. of Sessions*, 19 N. Y. S. 508; *Petaluma Savings Bank v. Court*, 111 Cal. 488, 44 Pac. 177; *United States v. Schurz*, 102 U. S. 407; *State v. Cape Girardeau Ct.*, 73 Mo. 560; *Brown v. Kalamazoo Circuit Judge*, 75 Mich. 274, 42 N. W. 827; *City of Emporia v. Randolph*, 56 Kan. 117, 42 Pac. 376; *People v. McRoberts*, 100 Ill. 458; *State v. Kinkaid*, 23 Neb. 641, 37 N. W. 612; *Gunn's Administrators v. County of Pulaski*, 3 Ark. 427.

9. To compel the performance of ministerial duties.

CROOK, JUDGE v. NEWBERG, ET AL.

1900. SUPREME COURT OF ALABAMA. 124 Ala. 479, 27 So. 432.

APPLICATION for mandamus by D. L. Newberg and Son, against Emmett F. Crook, Judge. From a judgment in favor of the plaintiffs, the defendant appeals. Affirmed.

TYSON, J.—This appeal is prosecuted from a judgment rendered by the circuit court of Anniston awarding the writ of mandamus to compel the appellant to certify his incompetency as probate judge to hear and determine the settlement of an account of one Gammon as administrator. The settlement to be made by the administrator is one required under §§ 298 and 299 of the Code after declaration of insolvency of the estate. One of the objections urged to the incompetency of the appellant in the probate court, and upon which in part was based the demand that he certify his disqualifications to hear and determine the matters involved in said settlement, as appears from the petition for the writ, was that S. L. Crook, a first cousin of the appellant, is one of the sureties upon the bond of Gammon as administrator. The facts of suretyship and the consanguinity of the surety S. L. Crook to the appellant, as alleged, are admitted in the answer to the petition. It has been too often adjudicated by this court to be now a matter of doubt, much less of dispute, that sureties upon an administrator's bond are bound and concluded by the decree against their principal primarily and to the same extent that their principal is bound. *Banks v. Speers*, 97 Ala. 563, 11 So. 841, and authorities there cited. So then, the question there presented, may be said to be this: Is a judge disqualified from determining a cause in which a judgment or decree must be rendered, in which a first cousin, though not a party to the proceeding *eo nomine* has an interest in the result of the trial?

(The court held that such first cousin is a "party" to the suit within the meaning of the statute and that in consequence the appellant was disqualified to act as judge.)

The next contention of appellant is that mandamus is not the proper remedy to require the judge to certify his incompetency to the proper officer to make the appointment of a special judge. The argument is that the judge must judicially determine his competency *vel non*, and that his decision of that question must be reviewed by appeal. The same argument was made in the case of *Ex parte State Bar Association* 92 Ala. 113, 8 So. 768, as was the contention that an appeal was adequate. We will not repeat here what was well and conclusively said by Judge McClellan in refutation of both of the contentions, and in holding that mandamus is the proper remedy. In that case, the judge, perceiving that he was incompetent by reason of interest, declined to try the cause. Here the judge conceiving that he is qualified, declined to certify his incompetency. There can be no difference in principle between the two cases. But the case of the *State v. Castleberry*, 23 Ala. 85, is directly in point. The county judge was a surety upon the bond of the defendant, who was charged with bastardy. The prosecutrix moved the court to transfer the cause to the circuit court, upon the ground of the interest of the judge and his consequent incompetency to try it. The judge decided that he had no interest which incapacitated him to try the cause and declined to make the order transferring it to the circuit court. Thereupon the prosecutrix applied to the circuit court for a writ of mandamus to compel him to transfer the case, which was awarded. On appeal, this court, after deciding that the county judge was incompetent to try the cause on account of interest, said, "We entertain no doubt but that mandamus was the proper remedy to compel the transfer of the cause." In *Graham v. People*, 111 Ill. 253, it was held, where a county judge is interested in an estate of a deceased person, he has no discretion to exercise as to whether he will transfer the matter in dispute to the circuit court for adjudication, and his power is limited to the simple ministerial duty to cause the papers and records to be certified to that court in conformity with the statute, and mandamus lies to compel him to do so if he refuses. Said the court: "A final objection urged by counsel for the respondent is that mandamus does not lie in this kind of a case, and *People v. McRoberts*, 100 Ill. 458, is referred to in support of the position. The cases are essentially different. There the judge had to exercise judgment and discretion. The right to the change depended upon the sufficiency of the petition, and of this the judge was to determine. But here the interest of the judge is a matter, knowledge of which exists in his own

breast, and it renders him absolutely incompetent to act,—goes to the jurisdiction of the court. There is nothing for him to exercise judgment upon. The fact existing, his power is limited to the simple ministerial duty of causing the papers and record to be certified, in conformity with the statute."

We have not considered the other alleged ground of incompetency so ably argued by the counsel on both sides, as a decision of that question is unnecessary under our view of the case. The judgment of the court below must be affirmed.

Whether a duty incumbent upon a court or officer is ministerial or not depends upon the nature of the act to be performed and not upon the character of the office. While *Mandamus* will lie to set a court in motion to perform what may be a pure judicial act, *i. e.*, to compel the exercise of judicial discretion, though in no wise directing to what effect, or in what manner such duty shall be performed, when the duty is ministerial, *Mandamus* will lie, not only to compel action, but to direct the performance of the specific ministerial act.

A ministerial duty has been defined as one to be performed under a given state of facts, in a prescribed manner, in obedience to legal authority, and without regard to or exercise of the judgment of the one doing it, upon the propriety of its being done. *Flourney v. City of Jeffersonville*, 17 Ind. 169.

See also *State v. Norton*, 20 Kan. 506; *Giboney v. Rogers*, 32 Ark. 462; *People v. Norton*, 16 Cal. 436; *Ex parte Graves*, 61 Ala. 381; *Water Co. v. Rives*, 14 Nev. 431; *Manns v. Givens*, 7 Leigh (Va.) 689; *Chicago, etc., R. Co. v. Wilson*, 17 Ill. 128; *State v. County Ct.*, 44 Mo. 230; *Kendall v. U. S.* 12 Pet. (U. S.) 534.

The writ lies to compel the entry of a judgment when nothing remains but such entry. *State v. Judge of 4th Dist. Ct.*, 28 La. Ann. 451; *Williams v. Saunders*, 5 Cold. (Tenn.) 60; *Cortleyou v. Ten Eyck*, 2 Zab. (N. J.) 45.

In the Federal courts, as has already been noted, *Mandamus* is only granted in aid of appellate jurisdiction. It has been issued to compel reinstatement of a cause dismissed for insufficient reasons. *Ex parte Bradstreet*, 7 Pet. (U. S.) 634; *Ex parte Parker*, 131 U. S. 221, 9 Sup. Ct. Rep. 708; To hear and determine a motion for a new trial. *Ex parte United States*, 16 Wall. (U. S.) 699; To compel the execution of a decree. *United States v. Peters*, 5 Cranch (U. S.) 115.

10. Removal of cause from State to Federal Courts.

HOUGH v. WESTERN TRANSPORTATION CO.

1864. CIRCUIT COURT OF UNITED STATES. 1 Biss. (U. S. C. C.) 425, 12 Fed. Cas. No. 6724, 29 Meyer's Fed. Dec. 895.

APPLICATION for a writ of mandamus to the superior court of Chicago, directing it to certify the case of Hough v. Transportation Co. to this court. The case was instituted in such state court against said corporation created in New York. They pleaded to the jurisdiction, to which plea plaintiff filed a replication and defendant demurred, which was sustained; defendant then petitioned the court for a removal of the cause according to the twelfth section of the judiciary act of 1879, which was overruled by said state court on the ground that said application had not been made in time, defendant's appearance having previously been entered by its plea to the jurisdiction. Whereupon defendant has filed this motion for a writ of mandamus against the superior court of the city of Chicago.

Opinion by DRUMMOND, J.

An application is now made to this court for a mandamus against the superior court, requiring it in the language of the statute, to proceed no further in the case, and to certify the case to this court, so that this court can take jurisdiction of it.

The question is, whether under the circumstances of the case, the mandamus will lie. I think it will not. Of course in expressing this opinion, it is not necessary for the court to determine whether the state court decided properly in refusing the application made by the defendant.

The only provisions of law, I believe, upon the subject of mandamus by the courts of the United States are contained in the thirteenth and fourteenth sections of the judiciary act of 1879. The thirteenth section provides that "the supreme court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction. The supreme court shall also have appellate jurisdiction from the circuit courts and courts of the several states in the cases hereinafter provided for specially; and shall have power to issue writs of prohibition to the district courts when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus, in cases warranted by the principles and usages of law, to any

courts appointed or persons holding office under the authority of the United States."

The fourteenth section provides that "all the before-mentioned courts of the United States," which of course include circuit courts, "shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the principles and usages of law," etc.

It is under this last clause that it is contended that the circuit court of the United States has power to issue a writ of mandamus in this case as being a writ agreeable to the principles and usages of law, and necessary for the exercise of its jurisdiction.

It is a little singular that throughout our judicial history there has been, so far as we have been able to ascertain, but one application made to the circuit court of the United States for this writ, where a state court has refused to comply with the twelfth section of the judiciary act. That case was the case in Tennessee, and is referred to in the case of *People v. Judges*, 2 Denio (N. Y.) 197. This case grew out of the case of *Kanouse v. Martin*, 15 How. (U. S.) 198, which was commenced in a state court of New York, and where the application was made to the state court to remove the cause to the circuit court of the United States. After the application was made the plaintiff amended his declaration so as to make the amount in controversy less than \$500, and thereupon the application was refused. The case went to the highest court of the state, and then to the supreme court of the United States. The supreme court of the United States reversed the case on the ground that the application should have been granted, and that, whenever it was made, the statute interposed, and declared that, if it was within the meaning of the twelfth section of the judiciary act, it was not competent for the state court to take any other steps in the case, and that it did, after the application was made, by allowing this amendment, and this was an erroneous act. Judgment was therefore reversed, and it was held that it was the duty of the court to look into the whole record and to determine whether the case was within the twelfth section of the judiciary act.

That was a case as I understand it, in which the counsel for the defendant, instead of applying to the circuit court of the United States for a mandamus, applied to the supreme court of the state for a mandamus. The opinion of the court was given by Bronson, Chief Justice, denying the application, on the ground that the fourteenth section of the judiciary act gave the circuit court of the United States power to issue the writ of mandamus, and therefore the application should be made to that court and not to the

supreme court. In this opinion they refer to the only case to which the notice of this court has been directed, which is the case of *Spraggins v. Humphries, Cooke* (Tenn.) 160. The judge says: "I am not aware that any of the Federal courts have questioned their power to act in the same manner. If they have power, there is no reason why this court should interfere." He says also, "I am aware that the court of appeals in Virginia awarded a mandamus to an inferior court in that state to compel the removal of a cause into the circuit court of the United States, *Brown v. Crippin*, 4 Hen. & M. (Va.) 173. But," he says, "until it be settled that the federal courts want the power to issue all such writs as may be necessary for the exercise of the jurisdiction conferred upon them by the constitution and laws, this court cannot act without the appearance of making an officious tender of its service." It was for this reason that the motion for a writ of mandamus was refused.

I admit that the case proceeds upon the ground that the proper source to apply to for a writ of mandamus was the circuit court of the United States and not to the state courts. The question then is whether that is a proper source. I think that the view of the judge was incorrect.

The rule laid down in relation to writs of mandamus by the supreme court of the United States is that it shall issue only to an officer, or to a judge, or to a court, where the duty to be performed is a ministerial one simply and where the judge or officer has no discretion.

When he has a discretion, the only thing the court will do by the writ of mandamus is to compel him to exercise that discretion by deciding the question or case without telling him how it shall be decided. It is only where it is a ministerial duty that the court will compel him by writ of mandamus to perform that duty, as by signing a bill of exceptions, or in relation to any other ministerial act to be performed by an officer. *Life & Fire Ins. Co. v. Heirs*, 8 Pet. (U. S.) 291; *Life & Fire Ins. Co. v. Adams*, 9 Pet. (U. S.) 573; *Ex parte Hoyt*, 13 *Id.* 279; *Ex parte Whitney, id.*, 404; *Commissioners of Patents v. Whitely*, 4 Wall. (U. S.) 522; *Decatur v. Paulding*, 14 Pet. (U. S.) 497; *United States v. Guthrie*, 17 How. (U. S.) 284; *United States v. Commissioner*, 5 Wall. (U. S.) 563.

I have no sort of a doubt that it is competent for the congress of the United States to give this power to the courts of the United States, but I think they have not yet done so. In the case of *Kendall v. United States*, reported in 12 Pet. (U. S.) 524, which was very elaborately argued and fully considered, the supreme court of the United States, after adverting to various cases says: "The result of these cases is that the authority to issue the writ of mandamus to an officer of the United States, commanding him to perform a



specific act required by a law of the United States, is within the scope of the judicial powers of the United States, under the constitution, but that the whole of that power has not been communicated to the circuit courts by law, or, in other words, that it was then a dormant power, not yet called into action and vested in those courts." The question arose there in relation to the power of the United States court in the District of Columbia, and it was as to the exercise of the power by that court that the question came up; but they refer to power existing in the circuit courts of the United States, in states, and say that the whole judicial power has not been delegated to the circuit court in states. So that it seems to be clear that it is competent for Congress to vest this power in the circuit courts of the United States.

The case in *Denio* is the only case to which the attention of this court has been directed. The question is whether it is binding and conclusive. I think that it is not, and that the absence of not only all decisions other than this, but of all the applications to the circuit courts of the United States, is a very strong argument against the exercise of this power.

It may seem by an examination of the various decisions made by the Supreme court of the United States, that it is only in peculiar cases that they have exercised this power by the writ of *mandamus*. I think that considerable light may be shed upon this case by an examination of the statute, which was passed at a very exciting period of our history—I mean the act of 2d March, 1833, 4 U. S. Stat. at Large, 633. The third section of that act provided "where suit or prosecution shall be commenced in any state court against an officer of the United States or other person, for or on account of any act done under the revenue laws of the United States, or under color thereof, or for or on account of any right, authority, or title set up or claimed by such officer or other person under any such law of the United States, it shall be lawful for the defendant in such suit or prosecution, at any time before trial upon a petition to the circuit court of the United States in and for the district within which the defendant shall have been served with process, setting forth the nature of said suit or prosecution, and verifying the petition by affidavit, together with a certificate signed by an attorney or counsellor at law of some court of record in the state in which said suit shall have been commenced, or of the United States. It shall be the duty of the clerk of said court, if the suit were commenced in the court below by summons, to issue a writ of *certiorari* to the state court, requiring the said court to send to the said circuit court, the records and the proceedings in the said cause. And thereupon it shall be the duty of the said state court to stay all further proceedings in said cause, and the said suit or prosecution upon the delivery of such process, or leaving the

same as aforesaid, shall be deemed to be taken and moved to the said circuit court, and any further proceedings trial or judgment therein, in the state court, shall be wholly null and void." Of course the statute giving the right to the court also gives, as a necessary consequence, the necessary means to compel a compliance with the writ.

So the congress of the United States could have done in this case. They have not seen fit to do so. They have given certain legal discretion to the judge of the state court, not that thereby the defendant is deprived of the right which the statute gives him, but that it is competent for the appellate state court to redress the wrong, if wrong has been done to the defendant, by correcting the error of the state court in which the suit was brought. If the highest court of the state will not do that the defendant has his remedy by writ of error to the supreme court of the United States, which would have jurisdiction in such case. All the cases in which the question has arisen have gone to the supreme court of the United States in this way, and the error of the state court where any existed, has been rectified in the supreme court.

There is a remark made by Judge McLean in the case of *Gordon v. Longest*, 16 Pet. (U. S.) 97, which also gives color to the application made in this case. That was a case where the writ was originally brought in a state court. Application was made for its removal to the circuit court of the United States. It was refused. The case went to the court of appeals for Kentucky, and was sent back. It then went again to the court of appeals, and finally to the supreme court of the United States. That court held that the application for the removal of the cause, ought to have been granted, and reversed the judgment of the court of appeals for that reason, and directed that the cause should be remanded with instructions that it should be transmitted to the circuit court of the United States. In giving his decision in this case, Judge McLean says: "A more summary redress might have been pursued by the defendant than the one which this court can now give him."

I concede to the counsel for the application in this case that there can be but little doubt that Judge McLean thought that it was competent for a circuit court of the United States to issue the writ of mandamus to the court of the state. That, I think must be the "more summary" remedy to which the judge refers, but this is a mere *dictum* of the judge; it was not necessary to the decision of the case; and of course is not binding upon any other court as a decision. I have thought on examining the various cases, that it would not have been the opinion of the supreme court if the point had been made before it.

It will be seen from what has been said that there is a remedy for the party; he is not without redress; he can take his exception;

the supreme court of the state can give him redress if the lower court has decided wrong; and if that court will not, the supreme court of the United States may. It is true, that this is a circuitous way to have any supposed wrong remedied, but still I think that it is the only way in which it can be done. The congress of the United States have not seen fit to give this summary remedy by the writ of mandamus, if it was competent for them to do it, and until they have done that, either by express language or by necessary implication, I do not think that this court ought to exercise a doubtful power.

The application will therefore be dismissed.

See also *Virginia v. Rives*, 100 U. S. 313; *In re Cronie*, 2 Biss. (U. S.) 160; *Fisk v. Union Pac. R. R. Co.*, 6 Blatchf. (U. S.) 362; *Campbell v. Wallen's Lessee*, Mart. & Yerg (Tenn.) 266; *Brown v. Crippin*, 4 Hen. & Munf. (Va.) 173.

When a circuit court of the United States has denied a motion to remand a cause which has been removed from a state court, Mandamus will not lie from the supreme court of the United States, to the circuit court to grant such a motion. *Ex parte Hoard*, 105 U. S. 578.

Mandamus is an appropriate remedy to compel inferior courts to proceed without an unnecessary delay in the trial of causes. *State v. Oliver*, 116 Mo. 188, 22 S. W. 637; *Cassidy v. Young*, 92 Ky. 227, 17 S. W. 485; *Justice v. Jones*, 1 Barn. (K. B.) 280; *Detroit, etc., R. Co. v. Gartner*, 95 Mich. 318, 54 N. W. 946.

To receive a verdict and render a judgment thereon. *State v. Knight*, 46 Mo. 83; *People v. Woodman*, 4 N. Y. S. 554; *Smith v. Moore*, 38 Conn. 105; *Munkers v. Watson*, 9 Kan. 669; *Swarthout v. McKnight*, 99 Mich. 347, 58 N. W. 315.

Matters of pleading and practice will rarely be interfered with by Mandamus, the proper and usual remedy being by writ of error or by an appeal. *Ex parte Poultney*, 12 Pet. (U. S.) 472; *Flint, etc., R. Co. v. Donovan*, 108 Mich. 80, 65 N. W. 583; *Ex parte Lawrence*, 34 Ala. 446.

In questions concerning the admissibility of evidence, Mandamus is never a proper remedy. *King v. Yorkshire*, 5 Barn. & Ad. 667; *Ex parte Smith*, 69 Ala. 528; But see *Ex parte Mahone*, 30 Ala. 49.

11. Approval of bonds.

a. General rule.

MCDONALD v. JENKINS.

1892. COURT OF APPEALS OF KENTUCKY. 93 Ky. 249, 19 S. W. 594.

HOLT, C. J.—This petition for a mandamus was filed in the Franklin circuit court to compel the appellant McDonald, as a justice of the peace, to approve a traverse bond in a proceeding upon a writ of forcible detainer which had been tried before him. The Code of Practice provides that bond shall be given, with sufficient surety to be approved by the justice, for the costs of the proceeding and all damages caused by the traverse. It is not admitted that the surety offered was sufficient. That is now, and has been all the time, in issue. No such abuse of discretion is shown as, according to some decisions, authorizes the issuance of the writ; and the question is presented whether the writ will issue where the justice has in good faith and in the exercise of his discretion refused to accept the surety upon the ground that he is not, in his opinion, sufficient, but the superior tribunal that is asked to issue the writ is, from the evidence before it, of a different opinion. As there is some contrariety of decision, it may help to guide us to a correct conclusion to briefly note some general and elementary principles of the law upon this subject. The use of this writ is confined to cases where the person has a clear legal right, and no other adequate remedy. It can only be invoked where without it there would be a failure of justice. If the act to be done be a mere ministerial one commanded by the law, if its performance be a mere ministerial duty, a mere incident to the office,—then whether the person who should do it be a judge or a strictly ministerial officer, the writ will lie to compel performance. In other words, it does not follow that an act is judicial because done by a judge. For instance, a justice acts as his own clerk; and where he is required by law to do an act which in its nature is ministerial, and involves no exercise of judgment, the writ will lie to compel performance in case of a refusal. Where, however, the act may or may not be done in the discretion or judgment of the party against whom the writ is sought, it can only be invoked to set him in motion, and not to control his discretion. It may be used to compel action by a judge, but not to control the discretion of his judgment. It is often difficult to draw the line between those acts which are purely ministerial and those which partake of a judicial character. The nature of the act must be considered. Its character must determine whether the writ will lie. Is it in its nature judicial or quasi-judicial? It is said that in this

case, when the justice had decided the case, his judicial functions ended, and that the taking of the bond was a mere ministerial act. He was required, however, to take a sufficient bond,—one that would cover the costs of the proceeding, and all damages that might result from the traverse. This embraced whatever damages might result from withholding the possession during the pendency of the traverse in all courts to which the case might be taken, and the reasonable expenses of defending it. He had not only to exercise his judgment as to the solvency of the surety, but in estimate of the probable damages. He had to hear and weigh evidence upon these subjects, and then exercise his best judgment. It is a general rule that where an officer has a discretion, it will not be controlled by mandamus, *Swan v. Gray*, 44 Miss. 393. This rule is necessary to the safe and pure administration of justice. If, in cases where he is required to exercise his judgment, he were constantly liable to suit, resulting in orders to do differently, his independence would be destroyed, and that public confidence in official action, which is so necessary in the state, would cease to exist. If, looking to any hardship that may arise, it is said that an individual may suffer by this error, yet this liability exists in all official actions. If he acts corruptly, or designedly abuses his authority, he is liable to action; but, being a disinterested party, he should not be liable to the costs of a suit where he errs in judgment, when he is required by law to exercise this judgment. Usually when a litigant can give security, which is in fact sufficient, he can give such security as will satisfy the doubt of the officer who is required to judge of it. The approval or disapproval of the bond requires, of course, the exercise of discretion and judgment. The act is in its nature judicial. If in such a case he may be ordered, against his own judgment, to accept the bond, his discretion is taken away, and the judgment of another is substituted in its place. The law in one breath would tell him to exercise his judgment, and in another it would take it away from him. After not only giving him the right to exercise his discretion, and requiring him at his peril to do so, it would take it away from him, and order to do that which, in his opinion, he ought not to do. It would subject to slavery his judicial opinion, and compel him to err in his judgment. This is contrary to reason, and the law does not require it. The writ will not lie to correct the erroneous judicial or quasi-judicial action of subordinate officers or tribunals. It has been held that the action of a clerk of a court in approving a bond, where he is required by law to judge of the solvency of the sureties, is quasi-judicial, and the exercise of the power will not be controlled by mandamus, *McDuffie v. Cook*, 65 Ala. 430; *Insurance Co. v. Cleveland*, 76 Ala. 321. It was the duty of the justice to take a sufficient bond. This necessarily required the exercise of discre-

tion and judgment. There was no admission that it was sufficient, which would have obviated the need of an exercise of judgment. The action was at least quasi-judicial, and therefore mandamus does not lie. The judgment is reversed with directions to dismiss the petition.

See also *McDuffie v. Cook*, 65 Ala. 430; *Hopkins v. Thomas*, 80 Ga. 641, 6 S. E. 165; *State ex rel. v. Judge of the Superior Ct.*, 26 La. Ann. 116; *Hawkins v. Litchfield*, 120 Mich. 390, 79 N. W. 570; *Bennett v. Swain Co.*, 125 N. Car. 468, 34 S. E. 632; *People v. Green*, 50 How. Pr. (N. Y.) 500.

Approval of bond will not be compelled. *Ex parte Harris*, 52 Ala. 87; *Keough v. Bd. of Aldermen*, 156 Mass. 403, 31 N. E. 387; *State v. Howard County Ct.*, 41 Mo. 247; *In re Reddish*, 45 N. Y. App. Div. 37.

But where the officer admits that the bond is sufficient, Mandamus will issue to compel him to approve it. *Copeland v. State*, 126 Ind. 51, 25 N. E. 866.

b. *Contra.*

STATE EX REL. THOMAS ADAMSON v. LA FAYETTE
COUNTY COURT.

1867. SUPREME COURT OF MISSOURI. 41 Mo. 221.

WAGNER, J., delivered the opinion of the court.

The case comes before us on a demurrer to the petition, and the only question is whether this court has jurisdiction over the proceeding. The relator avers his title to the office of sheriff of La Fayette county, and that he was duly elected, commissioned and qualified, and has acted as such up to the 6th of June, 1867, when the respondents acting in the capacity of county judges in said county made an order, which was entered of record in said court, declaring the office of sheriff vacant.

It is further alleged that on the 24th day of May, 1867, the county court of Lafayette county caused an order to be made stating that the revenue of the county for the year 1867 would be about \$85,000, and requiring the relator as sheriff to make a bond with sufficient security in double that sum within ten days therefrom; that on the 3d day of June, 1867, within the time specified, he appeared before the said court, then in open session, and produced, exhibited and offered for approval his bond as collector of the revenue, with good and sufficient sureties, in the penal sum of one hundred and seventy thousand dollars, and conditioned as required by law; that anticipating unfair and unjust action on the part of the said court, the justices whereof are personally and politically hostile to the relator, he took extraordinary pains in securing sure-

ties, and that thirty-five well known and responsible citizens of Lafayette county, who are owners of real estate situated therein, became his sureties in said bond and as such executed the same, he having first executed it as principal; that the said sureties are owners of real estate in the said county of the value of at least three hundred thousand dollars, subject to execution, over and above their debts and liabilities, and that this fact was and is well known to the justices of said county court; but, that notwithstanding the premises, the said county court actuated by a malice and with a determination to deprive him of his said office, through a corrupt, illegal and arbitrary use of the forms of the law, rejected and refused to accept the said bond, and also refused to allow the relator to prove the sufficiency and responsibility of his sureties.

The petitioner further states that on the 6th day of June, 1867, the said county court in order to carry out its malicious, arbitrary, corrupt and illegal intention and determination, made and adopted an order declaring the office of sheriff of said county vacant on account of the failure of the petitioner to execute his bond as collector, and ordered a new election; and a mandamus is prayed for to command and require the county court to accept and approve the said bond, &c.

The respondents demur to the petition on the ground that the county court has a discretion by law in refusing or approving bonds; that the subject matter belongs to its exclusive jurisdiction, and that having acted, this court cannot revise its action or take cognizance of its proceedings through the process of mandamus.

The writ of mandamus lies either to compel the performance of ministerial acts, or is addressed to subordinate tribunals, requiring them to proceed to exercise their judicial functions, and give judgments in cases before them. Mandamus will not lie to compel an inferior tribunal to give a particular judgment, or to reverse its decision where it has once acted; its peculiar scope and province being to prevent a failure of justice through delay or refusal to act. Where the subordinate tribunal acts judicially, it may be compelled to proceed, but it will be left to act and decide according to its best judgment. In such cases the party aggrieved by the decision has his remedy either by appeal or writ of error, and mandamus never issues except where the petitioner has a specific right and no adequate remedy.

The existence of an equitable remedy, such as specific performance, constitutes no impediment to the remedy of mandamus, *People v. Brennen*, 39 Barb. (N. Y.) 522; 10 Wend. (N. Y.) 395; nor will it be denied merely because the relator may have a remedy by action for damages—*People v. Taylor*, 1 Abb. Pr. (N. S.) (N. Y.) 200; S. C. 30 How. Pr. (N. Y.) 78. It is sufficient if the relator has no other remedy for the specific right which he claims.

Thus, it has been determined in New York that the commissioner of jurors is not a judicial officer but a ministerial officer within the rule. The act of the commissioner of jurors determining upon the sufficiency of the excuse relied on by such an applicant, is not a judicial act within the rule relating to mandamus. It is true, he has to decide on the sufficiency of the excuse offered by the juror to have his name stricken from the list of jurors; but still the nature of that excuse and the duty of the officer are defined by statute clearly; and when the truth of the fact relied on is shown to him, he has no discretion to exercise, and has no right to keep the name of the juror on the list—*People v. Taylor, supra*.

In *Dunklin County v. District Ct.*, 23 Mo. 449, the court said that the writ issued "in order to prevent disorder from a failure of justice or defect of police, and is therefore granted only in cases where the law has provided no specific remedy, and in justice and good government there ought to be one. It does not lie to correct the errors of inferior tribunals, by annulling what they have done erroneously, nor to guide their discretion, nor to restrain them from exercising power not delegated to them; but it is emphatically a writ requiring the tribunal or person to whom it is directed, to do some particular act appertaining to their particular duty, and which the prosecutor has a legal right to have done."

Now, is the approval or rejection of a sheriff's bond by the county court the exercise of such judicial function or discretion as will preclude this court from any supervisory control of its action? The G. S. § 2, p. 113, provides that the sheriff shall give bond and security to the state, to the satisfaction of the county court. The only duty of the court is to be satisfied that the bond and security is sufficient. There is nothing presented before the tribunal for adjudication, and its action is not the exercise of a judicial discretion or judgment within the meaning of the rule. The approval or rejection of the bond is essentially a ministerial act, though coupled with a discretion. *When the law devolves upon an officer the exercise of a discretion, it is a sound legal discretion, not a capricious, arbitrary or oppressive one.* In a case like the one presented here, if this court has no jurisdiction the petitioner would stand in the anomalous attitude of a person having a clear specific right, and yet be entirely remediless by law. A hostile court could remove any sheriff in the state and vacate his office by declaring his bond insufficient, and arbitrarily refusing to hear any testimony in regard to the solvency and pecuniary responsibility of his sureties. If the county court acts independent of all supervision, and its discretion is exclusive and uncontrollable, the result above indicated may follow, and there is no redress. It is true that the judges may be punished for malfeasance in office, but that furnishes no remedy to the person that is deprived of his rights. A

discretion delegated to an officer is a sound legal discretion, the meaning of which is well known and understood in the law, and is not an unlimited license to the officer to act and do as he pleases, irrespective of restraint. The universal practice has been, and it is doubtless the most satisfactory way of proceeding in determining the sufficiency of a bond, to examine the parties to the bond who have signed it touching their responsibility, and also other witnesses who are conversant with their means, in open court, and we are at a loss to know why this privilege was denied the relator in this case. He had the right to introduce evidence concerning the sufficiency of the bond, and it was the duty of the court to hear the same. § 3, Art. 4, of the State Constitution invests this court with the power of issuing mandamus and other remedial writs, and declares that it shall have a superintending control over all inferior courts of law. The citizen has the undoubted right to appeal to this remedial process in a proper case, when he would be otherwise without a remedy; and here if we have no authority to interfere, the action of the county court would be final, for neither appeal or writ of error will lie in this instance.

Our opinion is that the demurrer should be overruled. The other judges concur.

See also *State ex rel. v. Lafayette County Ct.*, 41 Mo. 545; *Beck v. Jackson*, 43 Mo. 117; *State v. County Ct.*, 44 Mo. 230; *State v. Wear*, 37 Mo. App. 325.

Section 3.—Mandamus to Public Officers.

1. In general.

AMERICAN CASUALTY AND SECURITY CO. v. FYLER.

1891. SUPREME COURT OF CONNECTICUT. 60 Conn. 448, 22 Atl. 494, 25 Amer. St. Rep. 337.

ANDREWS, C. J.—The plaintiff, a corporation organized under the laws of the State of Maryland, applied to the defendant, who is the insurance commissioner of this state, for the permission to transact in this state insurance business “against loss and damage caused by accident to any person or property arising from explosion of steam boilers or other causes, employers’ liability insurance, and the insurance of the fidelity of persons, employed in positions of trust.” The defendant heard the application, and at the request of the plaintiff gave a second hearing. Then, after consideration, he declined to grant to the plaintiff the permission it had asked for. The plaintiff thereupon made application to the superior court for a writ of peremptory mandamus, commanding the defendant to

permit the plaintiff to do in this state the kinds of business above mentioned. The defendant accepted service of the application so made to the superior court, and that application, by consent of all the parties has been treated as the alternative writ.

On the return day, the defendant came into court, and moved that the alternative writ be quashed. The court heard argument, and indicated that the motion ought to be granted, unless the writ should be amended, and gave the plaintiff time in which to amend. The plaintiff neglected to make any amendment, and the motion was granted. The plaintiff now appeals to this court.

The principle upon which persons holding public office may be compelled by a writ of mandamus to perform duties imposed upon them by law has been pretty clearly defined and adhered to in numerous cases in this court and in courts of other states: *Freeman v. Selectmen of New Haven*, 34 Conn. 406; *Seymour v. Ely*, 37 Conn. 103; *Batters v. Dunning*, 49 Conn. 479; *Atwood v. Partee*, 56 Conn. 80; *United States v. Black*, 128 U. S. 40; *Kendall v. United States*, 12 Pet. (U. S.) 524; *Decatur v. Paulding*, 14 Pet. (U. S.) 497; *United States v. Guthrie*, 17 How. (U. S.) 304; *Howland v. Eldredge*, 43 N. Y. 457; *People v. Brennan*, 39 Barb. (U. S.) 651; *Smith v. Mayor*, 1 Gray (Mass.) 72.

The principle set forth in these authorities is, that a writ of mandamus may issue where the duty which the court is asked to enforce is the performance of some precise, definite act, or is one of a class of acts purely ministerial and in respect to which the officer has no discretion whatever, and the right of the party applying for it is clear and he is without other adequate remedy; and that the writ will not issue in a case where the effect of it is to direct or control an executive officer in the discharge of an executive duty involving the exercise of discretion or judgment. The rule is stated very clearly by Mr. Justice Bradley in *United States v. Black*, 128 U. S. 40. He says: "The court will not interfere by mandamus with the executive officers of the government in the exercise of their ordinary official duties, even where those duties require the interpretation of the law, the court having no appellate power for that purpose; but where they refuse to act in a case at all, or where, by a special statute or otherwise, a mere ministerial duty is imposed upon them,—that is, a service which they are bound to perform without further question,—then if they refuse a mandamus may be issued to compel them." The same rule is given in *High Extr. Leg. Rem.* § 42, where that author adds: "Indeed, so jealous are the courts of encroaching on the discretionary powers of public officers in any manner, that, if any reasonable doubts exist as to the question of discretion or want of discretion, they will hesitate to interfere, preferring rather to extend the benefit of the doubt in favor of the officer." "A ministerial act is one which a person performs, in

a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment, upon the propriety of the act being done." *Flournoy v. City of Jeffersonville*, 17 Ind. 169, 79 Am. Dec. 468.

The subject of insurance engages nearly one hundred and forty sections of the general statutes, and covers more than thirty pages of the statute-book. All these sections taken together, form a complete and symmetrical branch of the executive government of the state, which in common speech is called the insurance department. The defendant is at the head of that department. His duties, are generally, that he "shall see that all the laws relating to insurance companies are faithfully executed." This alone vests him with a wide range of discretion and judgment.

But in addition to this general description of his duties, there are repeated sections which imposes upon him in terms the exercise of discretion. (Here the court enumerated and commented upon the several sections of the general statutes dealing with the authority and duties of the insurance commissioner.) Throughout all these sections the authority given to the defendant is administrative, or quasi-judicial, rather than ministerial: *Perry v. Reynolds*, 53 Conn. 527.

It is admitted that there is no statute or rule of law that in terms makes it the duty of the defendant to admit the plaintiff to do in this state the kinds of business specified in the application. If it is his duty so to admit the plaintiff, it is because the duty falls within the ordinary duties of his office; and this must be gathered from the construction of the insurance statutes. The defendant has construed these statutes as requiring, or at least as authorizing, him to refuse the plaintiff's application. The plaintiff insists that such construction is wrong. The whole contention of the plaintiff's counsel is, that the statutes of this state respecting insurance, if construed in the light of the policy of this state towards the insurance companies of other states, and in the light of state comity, would make it the duty of the defendant to grant the plaintiff's request; and they say that their interpretation of these statutes is too obviously correct as to admit of no dispute, and therefore the duty which they ask that the defendant should perform is purely a ministerial one. The contention, however, involves a contradiction. The construction of a statute is not a ministerial act; it is the exercise of judgment. If it is the duty of the defendant to admit or not to admit the plaintiff to do business in this state according to the interpretation to be put on the insurance statutes, then the admitting or refusing to admit involves the exercise of discretion and judgment. It is precisely the same kind of a duty which selectmen perform in respect to the admission of electors: *Perry v. Reynolds*, 53 Conn. 527; or assessors in respect to the liability of

property to taxation; *Goddard v. Seymour*, 30 Conn. 394. It is not a purely ministerial act, and a mandamus ought not to issue.

If the court was of the opinion that the defendant's construction of the insurance statutes was an incorrect one, it could not interfere by way of mandamus. That would be to substitute the judgment of the court for the judgment of the officer appointed by law, and would, in effect, make the court the insurance commissioner instead of the defendant.

"If a suit should come before this court which involved a construction of any of these laws, the court certainly would not be bound to adopt the construction given by the head of a department. And if they suppose his decisions to be wrong, they would, of course, so pronounce in their judgment. But their judgment upon the construction of a law must be given in a case in which they have jurisdiction, and in which it is their duty to interpret the act of congress, in order to ascertain the right of the parties before them. The court could not entertain an appeal from the decision of one of the secretaries, nor revise his judgment in any case where the law authorizes him to exercise discretion or judgment. Nor can it, by mandamus, act directly upon the officer, and guide and control his judgment or discretion, in the matter committed to his care, in the ordinary discharge of his official duties." *Decatur v. Paulding*, 14 Pet. (U. S.) 497. See also *United States v. Guthrie*, 17 How. (U. S.) 284; *Commissioner of Patents v. Whiteley*, 4 Wall. (U. S.) 522; *Gaines v. Thompson*, 7 Wall. (U. S.) 347; *Freeman v. Selectmen of New Haven*, 34 Conn. 406.

Tested by these authorities herein brought together, it is plain that the alternative writ in this case does not state facts which entitle the plaintiff to a peremptory mandamus, and that the motion to quash was properly granted.

There is no error in the judgment appealed from.

POND v. PARROTT.

1875. SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.
42 Conn. 13.

PARDEE, J.—The common council of the city of Bridgeport is authorized by the city charter to elect four police commissioners, who, with the mayor constitute the board of police commissioners, the duty of which board is to nominate to the common council suitable persons to fill the vacancies occurring in the police department. Both the relator and the respondent were members of the board of police commissioners on the 24th of May, 1873.

The relator alleges that on that day the respondent was, and

ever since has been, the clerk of the board of the police commissioners, and that it was his duty as said clerk to make and keep a true and correct record of their doings; that as such clerk, the respondent, by error and mistake, failed to make a correct record of certain votes passed by the board on that day, and made an incorrect and untrue record thereof, "in this, to wit:—instead of causing the record to state that William Anderson was nominated by said board a policeman in the place of Patrick Bracken, and that Norman Starr was nominated by said board as policeman in the place of Barney Farrell, he, the said clerk of said board, did add to the record of said meeting of May 24th, after the words, "William Anderson," the words "in place of Barney Farrell;" and after the words "Norman Starr," did add the words "in place of Patrick Bracken"; so that said record as so made by said clerk, did and does state that said Anderson was nominated by said board in place of Barney Farrell, when in fact and in truth the said Anderson was nominated by the said board in the place of Patrick Bracken; and does also state that said Starr was nominated in place of Patrick Bracken, when in truth and in fact the said Starr was nominated by the board in the place of the said Barney Farrell;" and that the respondent has always refused to correct the said record.

The relator asks the court of common pleas to issue the writ of mandamus, requiring the respondent to correct the record in the matter above referred to. The respondent demurs to the petition, and the case is reserved for the advice of this court.

The city charter does not prescribe the form or the manner in which the board of police commissioners shall make known their nominations of persons to fill vacancies in the police department. They may appear in person before each of the two branches of the common council while in session, and orally make the nominations; or they may send to the same body a written communication signed by themselves, containing the list of nominees. The law has not created the office of clerk of the board of police commissioners; it does not compel them to have a clerk for the purpose of recording their acts.

The respondent, himself one of the police commissioners, upon request from his associate members, undertook to make a memorandum of certain nominations made by the board and transmit a list thereof to the common council. He did not thereby become the incumbent of an office known to the law; he did not enter upon the discharge of any duty imposed upon him by law; he voluntarily assumed the performance of a service. He could lay down the burden whenever he desired to do so; the law could not force upon him the continuation or the completion of the work.

The writ of mandamus lies to compel a public officer to perform a duty concerning which he is vested with no discretionary power.

and which is either imposed upon him by some express enactment or necessarily results from the office which he holds. The respondent's undertaking being private and unofficial in its character, this writ does not concern itself as to the manner in which he performs it.

Again, inasmuch as the law has not clothed him with power, to the exclusion of all others, to make a record of the proceedings of said board and to communicate their nominations to the common council, there would seem to be no necessity for this extraordinary remedy; a majority of the board can at any time notify the common council that the respondent has inaccurately performed that which he had undertaken to do; they can present a corrected list of nominees; the council can receive it; his error in no manner fetters the action of either body in the premises; he cannot conclude them by anything which he has done or omitted to do.

In *Samis v. King*, 40 Conn. 304, which arose from a difference between the police commissioners on the one side and the council on the other, this court, speaking of the record now under consideration, said for the purposes of that case, that it was duly certified by the clerk of the board and was properly admitted by the superior court as evidence of the doings of the police commissioners. The relator argues that this remark lifts the respondent to the rank of a public ministerial officer and places him within reach of this writ. But we think that it goes to this extent only; that, as he made a record of the nominations and transmitted a list of them to the common council at the request and as the agent of his associate members of the board, it might under certain circumstances be admitted in evidence against them as tending to prove what they did, not intending thereby to declare it to be a record of so high and solemn a character as to import absolute verity and be conclusive. Many entries and memoranda are in a certain sense records and are admissible in evidence, and yet are not subject to correction by mandamus.

We advise the court of common pleas that the demurrer is well taken and that the petition is insufficient.

In this opinion the other judges concurred.

See also *Fox v. McDonald*, 101 Ala. 51, 13 So. 416; *State v. Houston*, 40 La. Ann. 393; *People v. Morton*, 156 N. Y. 136, 50 N. E. 791; *Hamilton v. State*, 3 Ind. 452; *Speed v. Common Council*, 97 Mich. 198, 56 N. W. 570; *People v. York*, 53 N. Y. S. 947.

THE COUNCIL OF GLENCOE v. OWEN.

1875. SUPREME COURT OF ILLINOIS. 78 Ill. 382.

MR. JUSTICE SCHOLFIELD delivered the opinion of the court.

(Part of opinion omitted.)

The next question to which our attention is invited, is, does the petition show sufficient grounds, conceding, as we must, that its allegations are true, for issuing the peremptory writ?

The allegations material to the question are:—The village of Glencoe is incorporated under a special charter; that on the 16th day of July, 1874, a petition signed by thirty voters of the village, among whom was the relator, was presented to the council of the village, (the president and trustees of said village, in whom all legislative authority is vested, being designated in the village charter as the "Council of Glencoe,") which council was then in session, requesting the council to submit the question, whether said village will be organized as a village under the act of the legislature of this state, in force July 1, 1872, entitled "An act to provide for the incorporation of cities and villages," to the decision of the legal voters of said village; that, at the same time a motion was made by a member of the council that the question be submitted to the voters of the village, at an election to be called for that purpose on the 4th day of August, 1874, which motion was laid over by a vote of the council, until the next meeting thereof; that, at the next meeting of the council, no action was had on the petition; that, at a meeting of the council held on the 10th day of August, 1874, motion was made that the election prayed by the petition be held on the first Tuesday of October, 1874; another member of the council moved to amend this motion by substituting the first Tuesday of April, 1875, for the first Tuesday of October, 1874, which was adopted; and the council then ordered the election prayed for to be held on the first Tuesday of April, A. D. 1875, but did not designate any place for holding the election, or select any judges therefor; nor did they cause any notice to be given of the time and place of holding the election, and they have taken no other action in regard to the election.

It is alleged that the designation of the first Tuesday in April, 1875, is an unreasonable postponement of the time of holding the election prayed for; that it is the day designated by the present village charter for holding the annual election for village officers; that the designation of such time was made with the purpose and intention of unlawfully postponing, and defeating the will of the voters of the village upon the question of reorganization; and it is stated as the opinion of the relator, that it is the intention of a majority of the council to defeat said election by a failure to discharge the duties enjoined by law.

It is argued by the respondent, the fixing of the time at which the election shall be held, is a matter of discretion, in which the council cannot be interfered with by the courts.

By § 1, art. 11 of the statute relating to cities, "villages and towns," (R. L. 1874, p. 242), it is enacted:—"Any town in this state, incorporated either under any general law for the incorporation of towns, and acts amendatory thereof, or under any special act for the incorporation of any town or village, may become organized as a village, under this act, in the manner following: Whenever any thirty voters in such town shall petition the trustees thereof to submit the question, whether such town will become organized as a village, under this act, to the decision of the legal voters thereof, it shall be the duty of the president and the trustees to submit the same accordingly, and to fix a time and place within such town for holding such election, and to appoint the judges to hold such election, and to give notice of the time, place and purpose of such election, by causing at least five notices thereof to be posted in public places in such town, for at least fifteen days prior to holding such election."

It is obvious, the council had no discretion, when the proper petition was presented, whether the prayer of the petition should be granted or not. The petition being in conformity with the statute, it was the plain duty of the council to act upon it at the earliest convenient moment, fix the time and place of holding the election, select the required judges therefor, and give the proper notice thereof. But, inasmuch as no time is designated by the statute, when the election shall be held, there was some discretion, necessarily in the council, in this regard. The implication of law, however, is, that the time fixed should be within a reasonable period, in view of all the circumstances. Precisely what would be a reasonable period, might in many instances, be of extremely difficult solution; instances of what would be an unreasonable period, can more readily be imagined, which will serve the present purpose of illustration. Had the election been postponed for ten years, or even five years, it would need no argument to show that it would amount, practically to a denial of the right guaranteed to the petitioners. No one would pretend the discretion vested in the council would justify this. So it would seem to be equally clear, that any postponement, not authorized by some apparent public necessity, would be unjustifiable. The discretion vested in the council cannot be exercised arbitrarily, for the gratification of feelings of malevolence, or for the attainment of mere personal and selfish ends. *It must be exercised for the public good, and should be controlled by judgment, and not by passion or prejudice. When a discretion is abused, and made to work injustice, it is admissible that it shall be controlled by mandamus.* Tapping Mand. (Am. Ed.) 66.

The change desired to be effected in the municipal government of

the village, through an election, was such as materially affected every citizen and taxpayer of the village. The petition was based on what were supposed sufficient reasons, having reference to the then existing state of affairs. If reform to be brought about through this means, was needed, and desired by a majority of the voters of the village, it was a wrong and an outrage that they should be compelled to submit to the evils that they labored under, for another year, when the change might reasonably be effected in a month. If there were leeches on the treasury,—a vicious revenue system, and imperfect police regulations,—in the opinion of a majority of the voters, to be gotten rid of only through a change in the organic law, they were entitled to have the change made as soon as it was practicable, and every day they were forced to submit to the continuance of the evils beyond that period, was so much arbitrary oppression by the council.

We can imagine no public necessity justifying the postponement of the election from the 16th of July, 1874, until the first Tuesday of April, 1875. It has every appearance of an attempt on the part of those filling the council, to perpetuate their own power to the utmost possible period, notwithstanding and in defiance of the wishes of the people. It is not admissible that this conduct shall be excused by the respondent assuming that a majority of the electors did not concur with the thirty petitioners, and therefore the election would have involved the village in useless expense. That was the question to be settled by the election, and it could in no other way be settled. The law gave the thirty electors the right to have the election, and to have it within a reasonable time, and its unnecessary postponement was in violation of that right.

The allegation of the petition, moreover, that this postponement was to defeat the will of the electors, is, by the default to be taken as true. Thus, it is conceded the discretion of the council is abused, and perverted to the attainment of an unjustifiable end.

If this postponement may be excused, it must follow, the council may, in the exercise of its discretion, indefinitely postpone the calling of the election between which, and an absolute refusal to call the election, the distinction is only in form, and not in substance.

We have no hesitancy in saying the case is one in which mandamus properly lies.

The only remaining objection is, that the prosecution is carried on by a private citizen, and not by a public prosecutor.

The relator shows that he is a resident, voter and taxpayer of the village.

It was said, in the *County of Pike v. State*, 11 Ill. 207, "The question, who shall be the relator in an application for a mandamus, depends upon the object to be attained by the writ. Where the object is the enforcement of a public right, the people are regarded as the

real party, and the relator need not show that he has any legal interest in the result. It is enough that he is interested as a citizen, in having the laws executed, and the right in question enforced." See also, *City of Ottawa v. People*, 48 Ill. 235; *Hall v. People*, 57 *id.* 310.

These cases hold a different rule from that announced by the cases referred to by the respondent, but are conclusive here.

The public prosecutor might, undoubtedly, have instituted this prosecution, but his failure to do so is no reason why the citizens, taxpayers and voters of the village shall be denied the right to have the council do its duty.

The remarks in *People v. Supervisors*, 47 Ill. 259, referred to by the counsel for the respondent, are not pertinent. They have reference simply to a contract, in which the contracting party was asking no aid of the court, and had no allusion to the case of a failure to perform a public duty.

We are of the opinion that there is no error in the record, and the judgment therefore must be affirmed.

Judgment affirmed.

STATE EX REL. SCHOOL DISTRICT 14 v. RICE, STATE
SUP'T OF ED.

1890. SUPREME COURT OF SOUTH CAROLINA. 32 S. Car. 97,
10 S. E. 833.

MCGOWAN, J. This is a petition in the original jurisdiction of this court for a mandamus compelling the respondent, James H. Rice, state superintendent of schools, "to make and promulgate such regulation prescribing the method of apportioning the income of the school tax, among the various school districts in each county as shall be in conformity with the laws and constitution of the state regulating the subject," etc. The act of 1881 (p. 610), "To prescribe the mode of ascertaining the average attendance of the free public schools of the state, and to apportion the school fund according to such attendance," now embodied in section 1051 of the general statutes, provides as follows: "The school month shall consist of 20 school days, and that this number shall be taken as the unit of compensation [computation] in estimating the average attendance of each pupil in the free schools of this state. For the school year 1882-83, and for each school year thereafter, each county school commissioner shall apportion the income of the school fund among the several school districts of his county in proportion to the average attendance on the free public schools for the last preceding year, as

ascertained by section 1 of this act. The state superintendent is hereby authorized and required to prescribe such regulation as may be necessary to enforce the provisions of this act," etc. Superintendent Rice, for the purpose of carrying out and enforcing the provisions of the above law, made and published the following regulations: "Rule 1. To find the average attendance of one school for one school month, add the number of pupils for each day and divide the sum by twenty. Rule 2. To find the average attendance of one school for one school year, add the average as found by rule one, and divide the sum by the number of school months that the school has been in session. Rule 3. To find the average attendance of a school district for one school year, add the averages as found by rule two. Rule 4. To find the average in a county for a school year, add the averages as found by rule three. Rule 5. To apportion the school fund, divide the proceeds of the school tax by the average attendance of a county, as found by rule four, and multiply the quotient by the average attendance of the several school districts. The products thus obtained will be the sums to which the respective districts will be entitled." These rules are certainly condensed and pregnant, but the petitioners allege that they "do not comport with the laws and constitution in this, that they prescribe as a school year the number of school months each school has been in session, thus creating a different school year for each separate school; whereas the relators insist that under the constitution of this state the school year in any school district consists of the period during which the school longest in session in said school district is in session; and, provided in no event can the school year be less than six months." The relators submit that the regulations should be made to conform to the constitution and laws, by adding a regulation that a school year in each school district shall consist of the period which the longest in session in such district shall be in session, but that in no event shall a school year be less than six months; and by striking out the words "that the school has been in session" at the end of rule two, and by substituting for them the words, "in the school year."

If the superintendent of education had omitted or refused to make the regulations required by the act, he might have been put in motion by mandamus, and required to make the regulations as he was expressly required to do. But we think the duty imposed upon him required discretion, and a high degree of judgment, and not being a plain ministerial duty, but judicial or quasi-judicial in its character, and having already performed the duty assigned him to the best of his judgment, we think mandamus will not lie against him. As we said in *Ex parte Mackey*, 15 S. C. 330: "A writ of mandamus is the highest judicial writ known to the constitution and the laws, and, according to the long approved and well established authorities, only issues in cases where there is a specific legal right to be en-

forced, or where there is a positive duty to be performed, which can be performed, and where there is no other specific remedy. Where the legal right is doubtful, or where the performance of the duty lies in discretion, or where there is another adequate remedy, a writ of mandamus cannot rightfully issue." See High Extr. Rem. § 9; *Ex parte Lynch*, 16 S. Car. 38; *Richland Co. v. Miller*, *id.* 236; *Mining Co. v. Haygood*, 30 S. Car. 519, 9 S. E. 686. But if this court could by mandamus correct "an error" of the superintendent of education in prescribing such rules as he considered necessary to enforce the law, it is far from clear that there was any "error." There can be no doubt that the act of the legislature, in accordance with the express terms of the "two mills" constitutional amendment, directs that the proceeds of that tax "shall be distributed among the several school districts in proportion to the respective number of pupils attending the public schools." That number could not in advance be ascertained with absolute certainty, by actual count. The only course then left was to approximate the number, by taking the average attendance in the previous year, which was adopted by the act, with instructions to the superintendent of education "to prescribe such regulations as may be necessary to enforce the law." This he endeavored to do by the several short condensed rules before stated. As we understand it there is no objection to rule 4, which prescribes the mode of ascertaining the average attendance, the year previous, for a county, nor to rule 3, to ascertain the average attendance for a school district. But the complaint is made that rule 2 operates unfairly between the different schools of the same school district, in this, that the average in those which are kept open the longest period in a year is reduced, thus giving them less of the school fund, when in justice they should have more. Does it follow that the average of a long term should be less than that of a short term? May not the same number of pupils attend during the long term? Possibly from the ordinary accidents, misfortunes and disappointments, the chances of falling off in a long term may be greater than in a short term. That however, would seem to be too uncertain and conjectural to enter as an element into the formation of fixed rules. Besides the act of the legislature positively directs that the school fund shall be distributed in proportion to the average attendance upon the schools for the last preceding year. It will be observed that while the legislature fixed the public school month, it did not fix the public school year, and it is stated that in consequence the schools are kept open for different periods. It does not seem to us that the superintendent is in any way responsible for this, or that he had the power to supply the deficiency. Until the proper lawmaking body sees fit to fix the period of the public school year, it is not clearly perceived what basis the superintendent could take in reaching the average attendance for the year previous, other than

"the months the school was in session," whether that was three, six, or nine months.

Some stress seems to be laid on § 3, art. 10, of the constitution, which declares that "the general assembly shall, as soon as practicable, after the adoption of this constitution, provide for a liberal and uniform system of free public schools, throughout the state. There shall be kept open at least six months in each year, one or more schools in each school district," etc. But in 1878 the constitution itself was amended by the adoption of the two mills school tax, which carefully divides the mode of distributing the funds to be raised under it, but makes no reference whatever to keeping open in each school district one or more schools for at least six months in each year. The fact is that this provision in the constitution of 1867 requiring school to "be kept open for at least six months in each year," like that other provision, that the school should be "free and open to all," with compulsory attendance, was only intended to go into operation as a part of the general system, with the establishment of which the general assembly was charged. We very much doubt whether that provision has any proper application to the school fund arising under the two mills constitutional amendment, for several reasons, and especially for the very conclusive one that, as we are informed, the fund arising under the amendment is not sufficient to support the public schools for more than three, or at most four, months in the year. The judgment of the court is that the petition for a writ of mandamus be refused.

SIMPSON, C. J., and McIVER, concur.

See also *Bailey v. Ewart*, 52 Iowa, 111; *State v. Palmer*, 18 Neb. 644, 26 N. W. 469.

In all cases the duty of the officer must be clear. *Peckett v. White*, 22 Tex. 559; *State v. Lincoln County*, 35 Neb. 346, 53 N. W. 147; *Daniels v. Long*, 111 Mich. 562, 69 N. W. 1112; *Cook v. Candee*, 52 Ala. 109.

Writ will not be granted in anticipation of a defect of duty. *Commissioners v. Alleghany*, 20 Md. 449.

2. Mandamus to the President of the United States.

Marbury v. Madison, 1 Cranch (U. S.) 137 (1803), and *Kendall v. United States*, 12 Pet. (U. S.) 524 (1838), early decided that the powers of the President are purely political and that he is therefore beyond the reach of any legal control save by impeachment. Mandamus has never been sought for against the President.

3. To other executive officers of the Federal Government.

UNITED STATES EX REL. WHITE V. BAYARD.

1887. SUPREME COURT OF THE DISTRICT OF COLUMBIA.
16 D. C. 428; 17 Am. & Eng. Corp. Cas. 485.

HAGNER, J. The petitioner asks that a mandamus may issue directing Mr. Bayard, the secretary of state, to pay over to him a sum of money which he alleges he is entitled to receive as assignee of certain claims adjudicated and allowed under the joint Mexican and American Commission.

1. The principal defense made to this application by the secretary is one which, if allowed, would not only be decisive of this case, but would be fatal to any claim of authority in this court hereafter to issue a mandamus against the secretary of state in his official capacity in any manner whatever, without regard to the question whether the duty sought to be enforced is purely ministerial, or one discretionary in its nature. The secretary presents this defense in the following language:

"And this respondent further answering, saith that the several sums of money mentioned in the said petition, and claimed to be due and payable to the relator, are held by him subject to the order and control of the President of the United States, and are disposable by this respondent at the discretion of the President only; and that, as this respondent is advised and believes, there is no law, as hath been mistakenly supposed, by the said relator, by which this respondent is invested with authority over the said sums of money independent of the President of the United States; and it being the opinion of the President that the public interests forbid the making of payments to the said relator, in the present condition of things as herein before set forth, this respondent submits that he is not subject to the process of mandamus in the premises; and that he therefore prays that he may be discharged from the said rule, with proper costs in his behalf sustained."

But for the earnestness with which this defense has been urged by the assistant attorney general in behalf of one of the highest officers in the government, and especially of his further contention that his position is supported by a decision of this court recently rendered in a case in which the same official was a defendant, we should have contented ourselves with a simple reference to the decision of the Supreme Court of the United States, announced eighty-four years ago, in the case of *Marbury v. Madison*, 1 Cranch (U. S.) 163, as a sufficient refutation of the contention.

But, under the conditions to which I have adverted, it is perhaps proper and respectful that something more should be said to show

that we have no alternative but to adhere to the position which we conceive has been thus so long settled.

The facts of that case, which is as familiar to the bar as any in the whole range of jurisprudence, were these: Shortly before Mr. Adams retired from the office of President he had signed a number of commissions as justice of the peace within this District, some of which had not been received by the person for whom they were intended; but after Mr. Jefferson was inaugurated, they were found by Mr. Madison in the office of the secretary of state. The President ordered the secretary not to surrender them, and thereupon Marbury, whose commission was withheld under this order, filed a petition for a mandamus in the Supreme Court of the United States, alleging his demand and the refusal of the secretary under the President's orders to perform what he averred to be a mere ministerial duty, and insisted that he had a right to have its performance enforced by a mandamus from that court.

The case was elaborately argued and considered in all its relations, and the writ was refused upon the ground that the Supreme Court possessed no original jurisdiction in the case. But the court entered upon an elaborate discussion of all the other points raised, and (among others) of this very question, whether in the case of a plain ministerial duty the secretary of state was amenable to the process of mandamus; and they decided unequivocally that he was.

I shall read a few sentences from the opinion, for the reasons I have stated.

Much stress has been laid, in the argument, in that case upon the peculiar language of the section of the act of 1789 establishing the Department of State, which, as was also urged in the argument before us, committed no authority to the secretary of state, except in subordination to the orders of the President.

The Chief Justice, in reply to this argument says, "By the constitution of the United States, the President is invested with certain political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and his conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders.

"In such cases their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being intrusted to the Executive, the decision of the Executive is conclusive. The application of this remark will be perceived by adverting to the act of congress for establishing the Department of Foreign Affairs. This officer, as his duties were established by that act, is to conform precisely to the will of the Presi-

dent. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.

"But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain duties; when the rights of individuals are dependent on the performance of those acts, he is so far the officer of the law,—is amenable to the laws for his conduct, and cannot at his discretion sport away the rights of others.

"The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the Executive, merely to execute the will of the President, or rather to act in cases in which the Executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy."

And again: "But, if this * * * be no intermeddling with a subject over which the Executive can be considered as having exercised any control, what is there in the exalted station of the officer, which shall bar a citizen from asserting, in a court of justice, his legal rights, or shall forbid a court from listening to the claim, or to issue a mandamus directing the performance of a duty, not depending on executive discretion, but on particular acts of congress, and the general principles of law?" 170.

"If one of the heads of departments commits any illegal act under color of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary modes of proceedings, and being compelled to obey the judgment of the law. How then, can his office exempt him from this particular mode of deciding on the legality of his conduct, if the case be such as would, were any other individual the party complained of, authorize the process? *It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined.* Where the head of a department * * * is directed by law to do a certain thing affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the President, and the performance of which the President cannot lawfully forbid, and therefore is never presumed to have forbidden; * * * in such cases, it is not perceived on what grounds the courts of the country are further excused from the duty of giving judgment that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department."

The language of the statute creating others of the executive departments, and apparently subordinating their actions to the will of the President, does not differ substantially from that used with respect to the Department of State. Such is the case with reference to the Department of War, of the Navy, and of the Treasury; but the writ has repeatedly been issued from this court against those officials, in matters ministerial, without a word from the Supreme Court, in disapproval of a jurisdiction, which since the case of *Kendall v. United States*, 12 Pet. (U. S.) 610, has been recognized as one of the flowers of our court. In the latter case, Mr. Justice Thompson, speaking for the Supreme Court says: "There are certain political duties imposed upon many officers in the Executive Department, the discharge of which is under the direction of the President. But it would be an alarming doctrine, that Congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution; and in such cases the duty and responsibility grow out of, and are subject to the control of the law, and not to the direction of the President."

In that case the granting of the writ had been resisted upon the ground of want of authority in the courts of the District, but not because of any distrust in the soundness of the general principles announced in *Marbury v. Madison*; and it may not be out of place to quote the following from a report of the argument of Mr. Attorney General Butler in that case, as evincing the understanding of a distinguished lawyer of that decision.

"And as the ordinary character of an officer's functions would not always determine the true nature of a particular duty imposed by law, he further agreed, that if an executive officer, the head of a department, or even the President himself, were required by law to perform an act merely ministerial, and necessary to the completion and enjoyment of the rights of individuals, he should be regarded *quoad hoc*, not as an executive, but as a merely ministerial officer; and therefore liable to be directed and compelled to the performance of the act by mandamus if Congress saw fit to give the jurisdiction." 12 Pet. (U. S.) 596.

Since 1803, the decision has stood undisturbed, as settled law. It is true that it has been criticised upon the ground that the court had declared itself without jurisdiction to issue the writ; and this was one of the reasons given by Mr. Jefferson in his letter of June 2, 1807, to Geo. Hay, the prosecuting attorney in the trial of Burr, why he thought "it material to stop at the threshold, the citing of that case as authority, and to have it denied to be law."

But in *United States v. Schurz*, 102 U. S. 395, the Supreme Court, in awarding a mandamus against the secretary of the interior to deliver a land patent to the patentee, notices this suggestion in these

words: "If the relator was entitled to the possession of the patent as his property, and it was the plain duty of the secretary to deliver it to him when demanded, then, under all the authorities, and especially the decisions of this court, he is entitled to the remedy he asks. From the case of *Marbury v. Madison*, 1 Cranch (U. S.) 163, down to the present time such has been the settled doctrine of this court. And though it may be said that the opinion of Chief Justice Marshall in that case was not necessary to the decision made, which was that this court had no original jurisdiction in that case, the principles of the case have been repeatedly recognized and acted upon by this court, and the case cited with approval in its definition of the circumstances under which a person holding public offices will be compelled to perform certain duties which are merely ministerial. *Kendall v. United States*, 12 Pet. (U. S.) 524; *Decatur v. Paulding*, 14 Pet. (U. S.) 497.

The decision has been equally followed by the courts of the different states, even where the proceedings were against the highest state officials, to compel the performance of ministerial duties. In *Magruder v. Swann*, 25 Md. 173, where the writ was ordered against the Governor, the whole subject was reviewed, and the more prominent state decisions are cited.

It would therefore have been impossible for this court to have held a contrary doctrine; and whatever language was used in the case of *United States ex rel. Angarica de la Rua v. Bayard*, 4 Mackey (D. C.) 310, referred to by the defendant, must be understood as relating solely to the facts of that case.

It is well understood that no mandamus can be issued against a public officer, unless the party applying shows a clear legal right to the relief claimed; and also that there exists a clear legal duty on the part of the official to perform the ministerial function involved.

In the case in 4 Mackey (D. C.) 310, neither of these essential prerequisites of jurisdiction appeared. Under a convention between the United States and Spain, a large sum had been awarded to *Angarica de la Rua* for losses sustained by him at the hands of the authorities in Cuba, which was paid over by Spain to the secretary of state. This officer paid over to the claimant the amount so received, except about \$41,000, which he retained until the Spanish Government should make provisions to pay the expenses of the arbitration. Several years afterwards the secretary paid over the sum so retained in full, but refused to pay to the claimant the amount of interest which had been realized from the investment of the sum, made by the secretary's order while awaiting the action of the Spanish Government. To compel the payment of this interest the mandamus was applied for; but it was refused by this court, as it appeared that the retention of the \$41,000 by the secretary, and its investment, and the earnings of interest on the sum, were all equally

without law, but were mere voluntary acts of the secretary; that the unchangeable practice of the government is not to pay interest upon claims, and that there could be no element of contract in the transaction; and hence, however equitable might be the petitioner's claim to the interest, it could not be enforced at law.

Has this claimant any other reasonable or attainable remedy? Plainly not. This is his only mode of obtaining his money, and if relief is denied him here he would be indeed remediless in the premises, and that deplorable result would ensue which Chief Justice Marshall in *Marbury v. Madison* declared would expose to obloquy our system of jurisprudence—that a suitor with a plain right to redress should be powerless to obtain it from the courts, because his rights are withheld by a powerful officer of the government created for his protection.

We think that it is our duty to direct that a peremptory mandamus shall issue, as prayed; and, it is so ordered.

See also *Carrick v. Lamar*, 116 U. S. 423, 6 Sup. Ct. 24; *Decatur v. Paulding*, 14 Pet. (U. S.) 499; *United States v. Guthrie*, 17 How. (U. S.) 284; *United States v. Commissioners*, 5 Wall. (U. S.) 563; *Kendall v. United States*, 12 Pet. (U. S.) 524; *Marbury v. Madison*, 1 Cranch (U. S.) 137; *United States v. Schurz*, 102 U. S. 378; *Secretary v. McGarrahan*, 9 Wall. (U. S.) 298; *United States v. Windom*, 137 U. S. 637, 11 Sup. Ct. 192; *United States v. Blaine*, 139 U. S. 306, 11 Sup. Ct. 607; *United States v. Lamont*, 155 U. S. 303, 15 Sup. Ct. 97; *United States v. Boutwell*, 3 McArthur (U. S.) 172.

4. To the Governor of the State.

PEOPLE EX REL. SUTHERLAND ET AL. V. THE GOVERNOR.

1874. SUPREME COURT OF MICHIGAN. 29 Mich. 320.

COOLEY, J. This is an application for an order requiring the governor to show cause why he does not issue his certificate showing that the Portage Lake and Lake Superior ship canal and harbor have been constructed in conformity with the acts of Congress making a land grant for the same, and the acts of the Legislature of this State, conferring the grant upon a corporation, which the relators now claim to represent.

When the application was first presented to us we declined to make the usual *ex parte* order until the question of our jurisdiction in the premises should have been argued, and this having now been done on the voluntary appearance of counsel for the relators, and of the attorney general on behalf of the governor, the question of jurisdiction is submitted for our decision.

The duty we are asked to compel the governor to perform is one imposed upon him by statute, and it consists in the issue of a certain certificate when he shall be satisfied that certain work has been done in conformity with the law. The purpose of the certificate is to furnish to the beneficiaries under the land grant the evidence of their right to the land, to which the certificate if granted, is understood to entitle them; so that the question involved in the controversy is, so far as the relators are concerned, one of private right and private property. The governor as we understand it, concedes that the canal and harbor are constructed in the proper manner, but he insists that the spirit and intent of the federal and state statutes have not been complied with, inasmuch as the canal has been constructed upon private property, so that the public are not assured the benefits anticipated and meant to be secured in making the grant; and for this reason he refuses his certificate. The relators thereupon insist that this presents for our consideration the simple question whether the governor construes correctly the statutes involved, and if not, they claim to be entitled to the proper remedy from the courts. In other words, they insist that the question involved has become, by the concession of the governor that the work has been done, purely a judicial question, involving nothing but a proper construction of the law.

It is not claimed on the part of the relators that this court or any other has jurisdiction to require and compel the performance by the governor of his political duties, or the duties devolved upon him as a component part of the legislature. It is conceded that these, under the constitution and laws, are to be exercised according to his own judgment, and on his own sense of official responsibility, and that from his decision to act or to decline to act there can be no appeal to the courts. Nor is it pretended that where an executive act whatsoever is manifestly submitted to the governor's judgment or discretion, such judgment or discretion can be coerced by judicial writ. What is claimed is, that where the act is purely ministerial, and the right of the citizen to have it performed is absolute, the governor, no more than any other officer, is above the laws, and the obligation of the courts, on a proper application, to require him to obey the laws, is the same that exists in any other case where an official ministerial duty is disregarded.

It may be doubted if this concession would not require us to dismiss the present application, if not to deny our jurisdiction in all cases where the governor is the respondent and his executive action or duties are involved. There is no very clear and palpable line of distinction between those duties of the governor which are purely political and those which are to be considered ministerial merely; and if we should undertake to draw one, and to declare that in all cases falling on the one side, the governor was subject to judicial process, and in all falling on the other he was independent of it, we

should open the doors to an endless train of litigation, and the cases would be numerous in which neither the governor nor the parties would be able to determine whether his conclusion was, under the law, to be final, and the courts would be appealed to by every dissatisfied party to subject a co-ordinate department of the government to their jurisdiction. However desirable a power in the judiciary to interfere in such cases might seem from the standpoint of interested parties, it is manifest that harmony of action between the executive and the judicial departments would be directly threatened, and that the exercise of such power could only be justified on the most imperative reasons. Moreover, it is not customary in our republican government to confer upon the governor, duties merely ministerial, and in the performance of which he is to be left to no discretion whatever; and the presumption in all cases must be, where a duty is devolved upon the chief executive of the state rather than upon an inferior officer, that it is so because his superior judgment, discretion, and sense of responsibility were confided in for a more accurate, faithful, and discreet performance than could be relied upon if the duty were devolved upon an officer chosen for inferior duties. And if we concede that cases may be pointed out in which it is manifest that the governor is left to no discretion, the present is certainly not among them, for here, by the law, he is required to judge, on a personal inspection of the work, and must give his certificate on his own judgment, and not on that of any other person, officer, or department.

We are not disposed, however, in the present case, to attempt on any grounds to distinguish it from other cases of executive duty with a view to lay down a narrow rule which, while disposing of this motion, may leave the grave question it presents to be presented again and again in other cases which the ingenuity of counsel may be able to distinguish in some minor particulars from the one before us. If a broad general principle underlies all these cases, and requires the same decision in all, it would scarcely be respectful to the governor, or consistent with our own sense of duty, that we should seek to avoid its application and strive to decide each in succession upon some narrow and perhaps technical point peculiar to the special case, if such might be discovered.

And that there is such a broad general principle seems to us very plain. Our government is one whose powers have been carefully apportioned between three distinct departments, which emanate alike from the people, have their powers alike limited and defined by the constitution, are of equal dignity, and within their respective spheres of action equally independent. One makes the laws, another applies the laws in contested cases, while the third must see that the laws are executed. This division is accepted as a necessity in all free governments, and the very apportionment of power to one department is

understood to be a prohibition of its exercise by either of the others. The executive is forbidden to exercise judicial power by the same implication which forbids the courts to take upon themselves his duties.

It is true that neither of the departments can operate in all respects independently of the others, and that what are called the checks and balances of government constitute each a restraint upon the rest. The legislature prescribes rules of action for the courts, and in many particulars may increase or diminish their jurisdiction; it also may in many cases, prescribe rules for executive action, and impose duties upon, or take powers from the governor; while in turn the governor may veto legislative acts, and the courts may declare them void where they conflict with the constitution, notwithstanding, after having been passed by the legislature, they have received the governor's approval. But in each of these cases the action of the department which controls, modifies, or in any manner changes or influences that of another, is had strictly within its own sphere, and for that reason gives no occasion for conflict, controversy or jealousy. The legislature in prescribing rules for the courts, is acting within its proper province in making law, while the courts in declining to enforce an unconstitutional law, are in like manner acting within their proper province, because they are only applying that which is law to the controversies in which they are called upon to give judgment. It is mainly by means of these checks and balances that these officers of the several departments are kept within their jurisdiction, and if they are disregarded in any case, the power is usurped or abused, the remedy is by impeachment, and not by another department of the government attempting to correct the wrong by asserting a superior authority over that which by the constitution is its equal.

It has long been a maxim of this country that the legislature cannot dictate to the courts what their judgments shall be, or set aside or alter such judgments after they have been rendered. If it could, constitutional liberty would cease to exist, and if the legislature could in like manner, override executive action also, the government would only become a despotism under popular forms. On the other hand it would be readily conceded that no court can compel the legislature to make or to refrain from making laws, or to meet or to adjourn at its command, or to take any action whatsoever, though the duty to take it be ever so clear by the constitution or the laws. In these cases the exemption of the one department from the control of the other is not only implied from the frame work of the government, but is indispensably necessary if any useful apportionment of power is to exist. It remains then to be seen on what grounds an intervention in the case of executive duties can be justified, when the

other departments acting within their respective spheres, are admitted to be so entirely independent.

It certainly cannot be on the ground that the executive is only a single person, who need await the advice or consent of no one before proceeding to the discharge of his duty, and whose default will consequently be more palpable when he acts wrongfully or refuses to act at all, than the default of any member of an aggregate body, like a legislature or a court, when action which requires consultation, deliberation and the consent of the majority fails to be taken.

In cases subject to the processes of the courts, an aggregate body may be compelled to act as well as an individual, though the process may not be so speedy, or the ascertainment of individual default so easy as when the duty is required of a single officer. Nor can it be because the reference of a duty or authority to an aggregate body raises an implication that it is entrusted to its judgment or discretion any more than if it were referred for performance or exercise to one person only. The nature of the act to be done must generally determine whether or not it is discretionary, and not the number of persons who are to do or decide upon doing it.

One reason very strongly pressed why the governor is subject to process in cases like the present is, that the act to be done is not required in the performance of an executive duty imposed by the constitution, but is in its nature a ministerial act, provided for by the statute, and which might, with equal propriety have been required of an inferior officer, who, beyond question, could have been compelled by mandamus to take the necessary and the proper action in the premises. And the question is put with some emphasis, whether, when individual interests depend upon the performance of a ministerial action, to which the party is entitled of right, the question whether there shall be a remedy or not can depend upon the circumstance that in the particular case the ministerial action is required of a superior officer when there is no reason in its nature why it might not have been required of an inferior.

A view similar to this has been taken in some cases, and the courts have undertaken to decide what are and what are not executive duties, and to assert a right to control the governor's action in some cases, while admitting their want of jurisdiction in others. *State v. Governor*, 5 Ohio St. 528; *Bonner v. Pitts*, 7 Ga. 473; *Cotten v. Governor*, 7 Jones (N. C.) 545; *Chamberlain v. Governor*, 4 Minn. 309; *Pacific R. Co. v. Governor*, 23 Mo. 353; *Magruder v. Governor*, 25 Md. 173. These cases for the most part are rested upon the dictum of Chief Justice Marshall in *Marbury v. Madison*, 1 Cranch (U. S.) 137, that one of the heads of department in the federal government might be compelled by mandamus to perform a mere ministerial duty; a dictum which cannot be understood as expressive of the opinion of that eminent judge that the president was subject to

the like process, but which is wholly inapplicable to a case like the present, unless it goes to that extent. For it cannot justly be claimed, when federal and state governments have been formed, so far as distribution of power is concerned, on the same general plan, that the executive of the union can claim immunity from judicial process any more than the governor of one of the states. In many cases it is unquestionable that the head of an executive department may be required by judicial process to perform a legal duty, while in other cases, in our judgment, the courts would be entirely without jurisdiction; and, as regards such an officer, we should concede that the nature of the case and the duty to be performed must determine the right of the court to interfere in each particular instance. When the head of a department acts as the mere assistant or agent of the executive in the performance of a political or discretionary act, he is no more subject to the control of the courts than the chief executive himself; but where a ministerial act is required to be done by him, independently of the executive, though in a certain sense he is an executive officer, it would be as idle to dispute his responsibility to legal process, as it would be to make the same claim to exemption on behalf of an officer entrusted with similar duties of a lower grade. This is emphatically the case under the constitution of this state, which provides for the election of the state and the inferior officers by the people alike, and makes the chief officers of the state below the governor as independent of his control in the performance of their duties as are the officers of the counties or of the townships.

But when duties are imposed upon the governor, whatever be their grade, importance or nature, we doubt the right of the courts to say that this or that duty might properly have been imposed upon the secretary of state, or a sheriff of a county or other inferior officer, and that inasmuch as in case it had been so imposed, there would have been a judicial remedy for neglect to perform it, therefore there must be the like remedy when the governor himself is guilty of a like neglect. The apportionment of power, authority and duty to the governor, is either made by the people in the constitution, or by the legislature in making laws under it; and the courts when the apportionment has been made, would be presumptuous if they should assume to declare that a particular duty assigned to the governor is not essentially executive, but is of such inferior grade and importance as to pertain properly to some inferior office, and consequently for the purposes of their jurisdiction, the courts may treat it precisely as if an inferior officer had been required to perform it. To do this would be not only to question the wisdom of the constitution or the law, but also to assert a right to make the governor the passive instrument of the judiciary in executing its mandates within the sphere of its own duties. Were the courts to go so far, they would break away from those checks and balances of government which

were meant to be checks of co-operation and not of antagonism or mastery, and would concentrate in their own hands something at least of the power which the people, either directly or by the action of their representatives, decided to entrust to the other departments of the government.

There is as to all the authority specially confided to the governor whether by the constitution or the laws, no safe or logical doctrine but this:—that reasons of a conclusive nature must be presumed to have been found, requiring the particular authority to be confided to the chief executive as one properly and peculiarly, if not exclusively pertaining to the department which he represents.

It is not attempted to be disguised on the part of the relators that any other course than that which leaves the head of the executive department to act independently in the discharge of his duties might possibly lead to unseemly conflicts, if not to something worse, should the courts undertake to enforce their mandates and the executive refuse to obey; but it is insisted that no such considerations are admissible in the present case, in which the governor, though questioning our jurisdiction, professes a willingness to be governed by our decision on it. The decision of this question, however, is to be a precedent in this state, and no voluntary appearance or no concession which may be made is to be allowed force to induce us to assert a jurisdiction which, though it might be useful in this case, would threaten conflict and danger in future controversies. Orders in these cases can only be enforced by process for the punishments of contempts of courts, and it is conceded that the governor might submit or not at his option; so that our decision in fact could only be advisory. And while we should concede, if jurisdiction was plainly vested in us, the inability to enforce our judgment would be no sufficient reason for failing to pronounce it, especially against an officer who would be presumed ready and anxious in all cases to render obedience to the law, yet in a case where jurisdiction is involved in doubt, it is not consistent with the dignity of the court to pronounce judgments which may be disregarded with impunity, nor with that of the executive to place him in a position where, in a matter within his own province, he must act contrary to his judgment, or stand convicted of a disregard of the laws.

But it is said that this conclusion will leave parties who have rights, in many cases, without remedy. Practically there are a great many such cases, but theoretically, there are none at all. All wrongs, certainly, are not redressed by the judicial department. A party may be deprived of a right by a wrong verdict, or an erroneous ruling of a judge, and though the error may be manifest to all others, than those who are to decide upon his rights, he will be without redress. A person lawfully chosen to the legislature may have his seat given by the house to another, and be thus wronged without remedy. A

just claim against the state may be rejected by the board of auditors, and neither the governor nor the courts can give relief. A convicted person may conclusively demonstrate his innocence to the governor, and still be denied a pardon. In which one of these cases would the denial of redress by the proper tribunal constitute any ground for interference by any other authority? The law must leave the final decision upon every claim and every controversy somewhere, and when the decision has been made, it must be accepted as correct. The presumption is just as conclusive in favor of executive action as judicial. The party applying for action, which, under the constitution and the laws, depends upon the executive discretion, or is to be determined by the executive judgment, if he fails to obtain it, has sought the proper remedy and must submit to the decision.

The cases of *Hawkins v. Governor*, 1 Ark. 570; *State v. Governor*, 25 N. J. 331; *People v. Bissel*, 19 Ill. 299; *Dennett, Petitioner*, 32 Me. 510, and *Mauran v. Smith*, 8 R. I. 192, which reach the same conclusion, are so full and satisfactory in their reasoning, that we might have deemed it proper to have dismissed the case with a simple reference to them, if there had not been opposing decisions, which are supposed to detract from the weight of their authority. Those opposing decisions, as we think, have not been sufficiently observant of the distinction between the governor, as being himself a distinct and an independent department of the government, and those administrative officers, who, though clothed with important powers, must be subject in the performance of their duties to the regulation, direction and control of the legislature, executive and judiciary, according as the intervention of the one or the other in a particular case shall become proper or necessary.

For the reasons stated we must decline to make any order to show cause.

CAMPBELL and CHRISTIANCY, JJ., concurred.

GRAVES, Ch. J., did not sit in this case.

In accord.—Authorities cited by Cooley, J., in principal case and *Mauran v. Smith*, 8 R. I. 192; *People v. Morton*, 156 N. Y. 136, 50 N. E. 791; *State v. Stone*, 120 Mo. 428, 25 S. W. 376; *State v. Warmoth*, 22 La. Ann. 1; *Dennett, Petitioner*, 32 Me. 508; *People v. Cullom*, 100 Ill. 472; *Bates v. Taylor*, 87 Tenn. 319, 11 S. W. 226.

Contra.

MARTIN, GOVERNOR, v. INGHAM.

1888. SUPREME COURT OF KANSAS. 38 Kans. 641, 17 Pac. 162.

ORIGINAL proceeding in mandamus. Action brought by Chas. K. Ingham, a tax payer and elector in the unorganized county of Grant, against John A. Martin, Governor, to enjoin him from the performance of certain acts in the organization of such county. At the hearing before the judge at chambers, a temporary injunction was granted, and the defendant brings error. Also an application by Geo. Getty, county attorney of Hamilton county, for an original writ in mandamus, to compel the governor to act upon the return of Thomas Jackson, census taker for the unorganized county of Grant.

VALENTINE, Judge.—This was an action brought in the district court of Shawnee county, by Chas. K. Ingham, a citizen, resident tax payer, and elector of the unorganized county of Grant, against John A. Martin, Governor of the state of Kansas, to perpetually enjoin the defendant from the performance of certain acts in the organization of said county. The facts as set forth in plaintiff's petition, are sworn to by him, and a large number of affidavits of other persons in support of such facts are filed with the petition as exhibits thereto. The petition and exhibits show substantially, and in detail, the following facts: On or about May 9, 1887, in pursuance of the statutes for the organization of new counties (Gen. Stat. 1868, c. 24, p. 249, *et seq.*; Laws 1872 c. 106; Comp. Laws, 1885, c. 24, par. 1400-1412; Laws 1886, c. 90; Laws 1887, c. 128), and upon proper preliminary proceedings had, the defendant as governor, appointed Thomas Jackson, as the census taker, the register of the votes of the electors for the temporary location of the county seat, and the assessor for the unorganized county of Grant. Immediately afterwards Jackson qualified by taking the prescribed oath of office, and proceeded to Grant county, where he did certain work and afterwards, about August 25, 1887, made his report to the Governor. He went into the county of Grant in a state of intoxication, and remained there in a maudlin condition for two weeks, during which time he was incapable of doing any kind of work properly. Upon his entering into the county he fraudulently, and for pay entered into an arrangement and conspiracy with certain parties to speculate upon the temporary organization of the county by the use of their influence and office. Pursuant to said arrangement the first overture was made to persons interested in the town of Cincinnati, and, it being refused, it was made to persons interested in the town of Ulysses, and accepted. After this arrangement had been made, Jackson began work. He then moved to Ulysses. He enumerated

the names of sixty fictitious persons, and counted them in favor of Ulysses for county seat. He excluded a large number of qualified voters from having their preferences recorded for county seat. This number was sufficiently large to affect the result. A large number of voters did vote for Cincinnati for county seat, and he corruptly changed their votes, and reported them as voting for Ulysses. He announced the voting closed by proclamation from the sheriff, and then took votes by night for Ulysses. He took and recorded a large number of votes for Ulysses of persons who pretended to live upon certain-described lands, who did not reside there, and whose names and addresses were unknown. He took the votes of a large number of other persons, and recorded them for Ulysses, who were not voters. A large number of voters voting in favor of Ulysses were procured by bribery. Frauds of various kinds were perpetrated during the enumeration, with his knowledge and consent. He was, and continued to be drunk, indecent, and disgusting. His examinations were carried on in a lascivious and disgraceful manner. He travestied the oath to persons enrolled, and performed many other acts of like nature and character as the above. The petition of the plaintiff also alleges as follows:—The plaintiff further states that the defendant, John A. Martin, governor, threatens to, and will at once, consider an act upon the report of the census taker, and will find therefrom that there are at least two thousand five hundred actual *bona fide* inhabitants of the said unorganized county of Grant; that five hundred of them are house holders; and that there is at least \$150,000 worth of property above legal exemptions, exclusive of railroad property, of which not less than \$75,000 worth is real estate; and will appoint three persons commissioners of said county, one to act as county clerk, and one to act as sheriff; and will designate and declare the town of Ulysses, as the place chosen by the greater number of legal voters, to be the temporary county seat of said county of Grant, unless he shall be restrained and prohibited from so doing by the order and injunction of this court.” The plaintiff also asks for a temporary injunction. Before any hearing was had, however, the governor signed the following stipulation: “(1). I desire that the court shall thoroughly examine into all questions of fraud, partiality, drunkenness, bribery, or unfair dealings on the part of the enumerator. (2). I expressly waive any objection as to the capacity of the present plaintiff to bring suit, and at no stage of the proceeding shall this question be raised by myself. (3). I do not waive, however, my right to dispute the authority of the court to inquire into these matters. John A. Martin, defendant.” Afterwards, and upon the foregoing affidavits and petition, and upon the plaintiff’s application for a temporary injunction, a hearing was had before the district court at chambers, and upon such hearing the judge granted the temporary injunction, and to reverse this order granting the tempo-

rary injunction, the defendant, as plaintiff in error, brings the case to this court.

It is claimed in this court, and also claimed in the court below, that the courts of Kansas have no jurisdiction to hear and determine any case like the one at bar. Indeed, it is claimed that the courts of Kansas have no jurisdiction to hear and determine any controversy that brings into question any act or acts of any member of the executive department of the state, and in Kansas all the state officers are members of the executive department. In Kansas, as elsewhere, there are three great branches or divisions of civil power, which, with some exceptions, are to be exercised by three separate departments; the legislative, or the law making power, the judicial, or the law construing power, and the executive, or the law enforcing power. With some exceptions the legislative power is vested in the legislature, the judicial power is vested in the courts, and the executive power is vested in an executive department. In Kansas, under the constitution, the executive department is constituted as follows: "Section 1. The executive department shall consist of a governor, lieutenant-governor, secretary of state, auditor, treasurer, attorney general, and superintendent of public instruction." Const. art. I, § 1. The governor, however, is at the head of the executive department, for § 3, of the same article of the constitution, also provides as follows: "§ 3. The supreme executive power of the state shall be vested in a governor, who shall see that the laws are faithfully executed." It is generally supposed that in a republican government all men are subject to the laws, and to the due administration of them, and that no man, nor any class of men, is exempt. There is no express provision in the constitution, nor in any statute, exempting any member of the executive department, chief or otherwise, from being sued in any of the courts of Kansas, or in any action coming within the jurisdiction of any particular court, civil or criminal, upon contract or upon tort, in *quo warranto*, *habeas corpus*, *mandamus* or injunction; or from being liable to any process or writ issued properly by any court, as subpoenas, summonses, attachment, and other writs or process; and if any of such officers are exempt from all kinds of suits in the courts, and from all kinds of process issued by the courts, it must be because of some hidden or occult implications of the constitution or the statutes, or from some inherent and insuperable barriers founded in the structure of the government itself, and not from the express provisions of the constitution or the statutes. So far as the present case is concerned, however, which is an injunction, and another case which is also before us, and which we are also considering, which is *mandamus*, it is only necessary for us to consider whether the governor, without reference to the other members of the executive department, is subject to the action of *mandamus* and injunction, or not. But, in order

to properly consider these questions, it is necessary that we consider many other questions. It might be proper here to state that, so far as the express terms of the constitution and the statutes are concerned, the governor is no more exempt from mandamus or injunction than he is from any other action or proceeding in the courts, or than he is from any process, civil or criminal, issued by the courts. We believe that only four cases can be found in the reports of the Supreme Court of Kansas in which it has been sought by a judicial determination to control any of the acts of the governor. The first was the case of the State v. Robinson, 1 Kan. 18. That was an application for a writ of mandamus to compel the board of state canvassers to canvass the election returns. It does not appear that any question of jurisdiction was raised or thought of in that case, but the court decided the case upon its merits and refused the writ. The second was the case of *In re Cunningham*, 14 Kan. 416, in which an application was made for a writ of mandamus to compel the governor, Thomas A. Osborn, to issue a patent for certain lands. It was understood at the time that the governor was willing to issue the patent if the supreme court said that it was his duty to do so, and the only question presented to the court, or decided by it, was whether such was his duty or not. The court held that it was not his duty, and refused the writ. The third was that of *State v. St. John*, 21 Kan. 591. In that case the alternative writ of mandamus was allowed. At first the defendant's counsel filed an answer disputing the jurisdiction of the court, but afterwards the governor, by his counsel expressly waived all question of jurisdiction, and the governor himself also desired that the court should hear and determine the case without any reference to any question of jurisdiction, stating that he would obey the decision of the court, whatever it might be. The court heard and determined the cause, and awarded a peremptory writ of mandamus; but no such writ was ever issued, as the governor immediately proceeded to act in accordance with the decision of the court, which rendered the writ unnecessary. The fourth case was the case of *Wilson v. Price-Raid Aud. Com.*, 31 Kan. 257, 1 Pac. 587. That case was a supposed appeal from the auditing commission to the supreme court. No question of jurisdiction was raised, but the court itself, for inherent defects and want of merit in the case dismissed the same. There are a number of cases in which the other state officers than the governor have been sued in the courts of Kansas. Two of such cases are the cases of *State v. Robinson*, above cited, and *Wilson v. Price-Raid Aud. Com.* above cited. The other cases are as follows: In the case of *State v. Lawrence*, 3 Kan. 95, an application was made for a writ of mandamus to compel the defendant, as secretary of state, to issue a certificate of election to the relator. The question of the jurisdiction of the court to grant the same, was raised, but the court

decided in favor of its jurisdiction, and granted a peremptory writ of mandamus. In the case of *State v. Board*, 4 Kan. 261, which board consisted of the state superintendent of public instruction, the secretary of state, and the attorney general, no question of jurisdiction was raised, and the court decided the case upon its merits, and refused to grant the writ of mandamus prayed for. In the case of *State v. Barker*, 4 Kan. 379, no question of jurisdiction was raised, and the court decided the case upon its merits, and awarded a peremptory writ of mandamus to compel the secretary of state to deliver to the relator copies of the recently enacted laws for the purpose that he might publish the same for the state. The case of *State v. Barker*, 4 Kan. 435, is similar to the case last cited, except that in this case it was decided that the relator was not entitled to copies of the laws, and the writ of mandamus was refused. In the case of *State v. Anderson*, 5 Kan. 90, an injunction was prayed for against the state treasurer, and the case was decided upon its merits, and it was held that upon the facts, the plaintiff was not entitled to the injunction. In the case of *Graham v. Horton*, 6 Kan. 343, an injunction was allowed in favor of Horton and against the state treasurer. In the case of *State v. Thoman*, 10 Kan. 191, a peremptory writ of mandamus was allowed against the auditor. The case of *Prouty v. Stover*, 11 Kan. 235, was tried upon its merits without any question of jurisdiction being raised, and the writ of mandamus prayed for was refused. The case of *Martin v. Francis*, 13 Kan. 220, was decided upon its merits without any question being raised with respect to the jurisdiction of the court, and the writ of mandamus prayed for was refused. In the case of *Francis v. Atchison, etc. R. Co.*, 19 Kan. 303, an injunction was allowed by the district court against the state treasurer, and the supreme court heard the case upon its merits, without reference to the question of jurisdiction, and decided that upon the facts of the case the railroad company, which was the plaintiff below, was not entitled to such injunction. In the case of *State v. Francis*, 23 Kan. 495, a peremptory writ of mandamus was allowed against the treasurer. In the case of *Crans v. Francis*, 24 Kan. 750, mandamus against the treasurer was in effect sustained. In the case *State v. Francis*, 26 Kan. 724, injunction against the state treasurer was sustained. In the case of *Atchison, etc. R. Co., v. Howe*, 32 Kan. 737, 5 Pac. 397, injunction against the state treasurer was also sustained.

It would seem that the question as to whether the courts of Kansas may control any of the acts of the governor is still an open one. The question, however, whether the courts of Kansas can control any of the acts of the other members of the executive department or not, would seem from the general practice of the bench and the bar, and from the actual decisions of the courts, to have been settled in the affirmative. Of course this general practice and these

decisions, with relation to the other members of the executive department, do not necessarily control with reference to the governor, for there is some room under §§ 1 and 3 of art. 1 of the constitution above quoted, for a distinction to be made between the acts of the governor and the acts of the other members of the executive department; for while the executive department consists of the governor, the lieutenant governor, secretary of state, auditor, treasurer, attorney general, and the superintendent of public instruction, yet the governor is the supreme head thereof. In the other states there is a great conflict of authority as to whether any of the acts of the governor may be subject to judicial control or not. Upon the affirmative of this question the following among other cases are cited: Tennessee, etc., *R. Co. v. Moore* (Mandamus), 36 Ala. 371; *Middleton v. Lowe* (Mandamus), 30 Cal. 596; *Harpending v. Haight* (Mandamus), 39 Cal. 189; *Governor v. Nelson* (Mandamus), 6 Ind. 496; *Baker v. Kirk* (Mandamus), 33 Ind. 517; *Gray v. State* (Mandamus), 72 Ind. 567; *Magruder v. Swann* (Mandamus), 25 Md. 173; *Groome v. Gwinn* (Mandamus), 43 Md. 572; *Chamberlain v. Sibley* (Mandamus), 4 Minn. 309 (Gil. 228); *Chumasero v. Potts* (Mandamus), 2 Mont. 242; *Wall v. Blasdel*, (Mandamus), 4 Nev. 241; *Cotten v. Ellis* (Mandamus), 7 Jones (N. C.) 545; *State v. Chase* (Mandamus), 5 Ohio St. 528. A vast number of cases might be cited where courts have held that the official acts of the members of the executive department other than the governor may be controlled by judicial determination. Upon the negative of the above question the following cases are cited: *Hawkins v. Governor* (Mandamus), 1 Ark. 570; *State v. Drew* (Mandamus), 17 Fla. 67; *Low v. Towns* (Mandamus), 8 Ga. 360; *People v. Bissell* (Mandamus), 19 Ill. 299; *People v. Yates* (Mandamus), 40 Ill. 126; *People v. McCullom* (Mandamus), 100 Ill. 472; *State v. Warmouth* (Mandamus), 22 La. Ann. 1; *Dennet v. Governor* (Mandamus), 32 Me. 508; *People v. Governor* (Mandamus), 29 Mich. 320; *Rice v. Austin* (Mandamus), 19 Minn. 103 (Gil. 74); *Western R. Co. v. De Graff* (Mandamus), 27 Minn. 1, 6 N. W. 341; *Vicksburg R. Co. v. Lowry* (Mandamus), 61 Miss. 102; *State v. Governor* (Mandamus), 39 Mo. 388; *State v. Governor* (Mandamus), 25 N. J. Law, 331; *Hartranft's Appeal* (Contempt), 85 Pa. St. 433; *Mauran v. Smith* (Mandamus), 8 R. I. 192; *Turnpike v. Brown* (Mandamus), 8 Baxt. (Tenn.) 490.

There are other cases cited which hold that none of the acts of any of the officers belonging to the executive department can be controlled by the courts, among which cases are the following: *People v. Hatch* (Mandamus), 33 Ill. 9; *State v. Deslonde* (Mandamus), 27 La. Ann. 71; *State v. Dike* (Mandamus), 20 Minn. 363 (Gil. 314); *State v. Whitcomb* (Mandamus), 28 Minn. 50, 8 N. W. 902; *Secombe v. Kittleson* (Injunction), 29 Minn. 555, 12 N. W.

519; *Houston, etc. R. Co. v. Randolph (Mandamus)*, 24 Tex. 317; *Bledsoe v. International R. Co. (Mandamus)*, 40 Tex. 537; *Galveston, etc. R. Co. v. Gross (Mandamus)*, 47 Tex. 428; *Chalk v. Darden (Mandamus)*, *id.* 438. The principal ground upon which these last-cited cases were decided is that the officers against whom the court was asked to entertain jurisdiction were members of the executive department, the same as the governor, though not at the head as he is, and that therefore as the acts of the governor, in their opinion could not be controlled by the courts, because he is a member of the executive department, neither can the acts of any other officer of the executive department be controlled. This same kind of reasoning, however, is used by the supreme court of California to prove that the acts of the governor in some instances may be controlled by the courts. *Harpending v. Haight*, 39 Cal. 189. In this case it is said in substance that if it be conceded that the governor, because he is the chief of the executive department, may for that reason be allowed to enjoy an absolute immunity from judicial process, even when his duty in the given instance is only ministerial, and in a case where an individual has a vested right to have the duty performed, then the same exemption from judicial process may be set up by any one of the other officers of the executive department. But it is held in that case that the other members of the executive department could not effectively interpose such exemption, and, therefore that the governor could not. It would therefore seem from two classes of cases that the courts must hold, either that the courts may control some of the official acts of all the members of the executive department, including the governor, or that they cannot control any of the official acts of any of the officers. In this state it has already been held that some of the official acts of some of the officers of the executive department may be controlled by the courts, and, therefore if the above reasoning is sound, it would follow that some of the acts of the governor could also be controlled by the courts. It would be proper here to say that none of the courts ever attempt, by either injunction or mandamus, or by any other action or proceeding, to control executive, judicial, legislative, or political discretion; and never indeed attempts to control any pure legislative, judicial or executive act of any kind, nor pure discretion of any kind, except when a superior court on appeal, reviews a decision of an inferior court and courts generally do not interfere by injunction or mandamus where another plain and adequate remedy exists. The only acts of public functionaries which the courts ever attempt to control by either injunction or mandamus, are such acts only as are in their nature strictly ministerial; and a ministerial act is one which a public officer or agent is required to perform upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority,

and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed. Hence many of the above cited cases, wherein it is said that the acts of the executive officers of the state could not, in the particular instance under consideration, be controlled by the courts, are not in conflict with those decisions that hold otherwise; for many of such cases were decided upon the theory that the court was asked to control executive, judicial or political action, or discretion of some kind. If we should deduct all the cases that were decided upon the theory that they were asked to control executive, political or discretionary action of some kind, and not consider any of the dictum of such cases, and thereby leave only such cases as necessarily included a decision, (not *dictum*,) and decided that the courts could not in any case control any act to be performed by the governor, the weight of the judicial authority would probably be that the courts may control any mere ministerial act to be performed by the governor.

The decisions holding that the courts cannot control any of the acts of the governor are based upon many different kinds of reasons. Some of such decisions, like the one in the case of *Hawkins v. Governor*, 1 Ark. 570, and the one in the case of *State v. Governor*, 25 N. J. Law, 331, are based upon the theory that all duties imposed upon the governor by the constitution are strictly and exclusively executive or political and not ministerial, and therefore that the courts cannot interfere with the performance or non-performance of those duties. There are other decisions, like the one in the case of *Turnpike Co. v. Brown*, 8 Baxt. (Tenn.) 490, and the one in the case of *State v. Drew*, 17 Fla. 67, which extend this principle and hold that all duties imposed upon the governor by either the constitution or the statutes must necessarily be executive or political, and not ministerial, and this upon the theory that the mere act of conferring duties upon the governor, whatever their inherent essences may be, renders them executive or political. It is said that, when they are conferred upon the governor rather than upon some inferior officer, they are so conferred because in the opinion of the law-making power, founded presumptively upon sufficient reasons, the duties themselves, properly and peculiarly, if not necessarily, belong to the executive department, and that they are conferred upon the governor because of his discretion, judgment, sense of responsibility, and fitness; and therefore it is claimed that these duties must necessarily be executive or political, and not merely ministerial, whatever they may be in their inherent and essential characteristics. If this were true when the duties were conferred upon the chief of the executive department, why would it not also be true when such duties are conferred upon any other member of the executive department? Is not any particular power substantially the same wherever it may be placed? Judicial power in the hands of a

justice of the peace is substantially the same as it is when placed in the hands of a judge of the supreme court. It may be admitted, however, that with respect to some duties, and even with respect to some ministerial duties, a transformation might take place if such duties were transferred from an inferior officer and placed in the hands of the highest executive officer; for some ministerial duties embody within their confines some slight elements of judgment and discretion; but can this be true with respect to all ministerial duties? Suppose that such duties in their very natures and essences are nothing more than the purest of ministerial duties, with no elements of judgment or discretion in them, and not in any manner connected with any legislative, judicial, or executive duty, and are such duties only as could be conferred upon any other citizen of the state of Kansas; then why should they be considered as being transformed into executive or political duties by being conferred upon the governor? Would they not still be ministerial duties? The conferring of pure ministerial duties like the above mentioned, upon the courts or the judges of courts, never transforms them into judicial duties; and, although mandamus will not lie to control or review judicial determination or discretion, yet it will lie to control any pure ministerial act of the court or judges thereof. *Duffet v. Crosier*, 30 Kan. 150, 1 Pac. 59; High Extr. Rem. § 230, *et seq.* Many years ago Chief Justice Marshall in the case of *Marbury v. Madison*, 1 Cranch (U. S.) 137, said: "It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined." And such is the rule in all cases, unless the courts are required to make an exception in favor of the governor. In all other cases it is not the rank or the character of the individual officer, but the nature of the thing to be done, which governs. No other officer is above the law, and every other officer to whatever department he may belong, may be compelled to perform a pure ministerial duty. The objection oftenest urged against the court exercising any control over any of the acts of the governor is that the three departments of the government, the legislative, the judicial, and the executive, are separate and distinct, and that each is equal to, co-ordinate with, and wholly independent of the other. Now it is true, with some exceptions, that the legislature cannot exercise judicial or executive power, that the courts cannot exercise legislative or executive power, and that the executive department cannot exercise legislative or judicial power; but it is not true that they are entirely separate from each other or independent of each other, or that one of them may not in some instances control one of the others. The most of the jurisdiction possessed by the courts depends entirely upon the acts of the legislature, and the entire procedure of the courts, civil and criminal, is prescribed

by the legislature. Nearly all of the duties of the governor are imposed upon him by the legislature. The legislature may also impeach the governor or any other state or judicial officer mentioned in the constitution. The courts may construe all the acts of the legislature, whether such acts have been signed by the governor or not, and may determine whether they are in contravention of the constitution or not, and, if believed to be in contravention of the constitution, may hold them void. The courts may also determine that a supposed member of the legislature is not a member at all, because he represents no district; and may also determine that the legislature cannot consist of more than a certain number of members. *Prouty v. Stover*, 11 Kan. 235; *State v. Tomlinson*, 20 Kan. 692; *State v. Francis*, 26 Kan. 724. The courts may also pass upon the validity of the acts of the governor. *State v. Ford* Co. 12 Kan. 441. It is also believed that the courts have power to require the governor to attend a trial as a witness, and, if so, have they not the further power to imprison him for contempt if he disobeys? And if so would not the courts then interfere with his ability to perform his executive duties. In such a case the state might have to rely upon the lieutenant-governor. No act of the legislature can become a law unless it is presented to the governor for his signature and approval. The governor may also convene the legislature whenever he chooses. Also the legislature and the courts are able to perform their respective duties unmolested, because of the known power of the governor to call out the militia to aid and protect them in doing so, if necessary. It will be seen from the foregoing that the different departments of the government are not independent of each other. The power last mentioned, however, is also invoked as an argument against the courts' attempting to control any act or acts of the governor. It is said that if the governor opposes any order or judgment of the court, it cannot be enforced; for it is said that he has the entire control of the militia. But are the courts to anticipate that the governor is not to perform his duties? Should not the courts rather presume that, when a controversy is determined by the courts,—the only tribunals authorized by the constitution or the statutes to construe the laws, and to determine controversies by way of judicial determination,—the governor, as the chief executive officer of the state, would see that such determination should be carried into full effect. Such would be his duty, and no one should suppose that he would fail to perform his duty, when his duty is made manifest by a judicial determination of the courts. No department should ever cease to perform its functions for fear that some other department might render its acts nugatory, or for fear that its acts in some manner might affect the conduct or status of some other department. Each department ought to do what is right within its own sphere, and presume that the other departments would do

the same. The legislature is not bound to refrain from passing laws affecting the duties of the executive department, whether the governor approves them or not. The legislature may pass laws over the governor's veto, and this for the government of the executive department, and the legislature is not bound to anticipate that the governor might refuse to enforce such laws. Each department should scrupulously perform the duties peculiarly entrusted to its own department, without reference to how the same might affect the other departments. Besides if this argument from the governor's control of the militia were carried to its full extent, it would prevent any court from ever issuing a subpoena, or any other writ or process to the governor, or from ever arresting him or ordering his arrest for any assault and battery, or for anything else, because the governor might in any such case refuse to obey the writ or the order of the court, and might call on the militia to assist him in his resistance.

Perhaps we should say something further with respect to the claim that the three great branches of the government, the legislative, the judicial, and the executive, are co-equal and co-ordinate, and that one cannot control and direct the others. This may be true to some extent, and yet, as we have already seen, it is not true in many cases. For the purpose of passing laws, the legislature is supreme, and the other departments must obey. And for the purpose of ultimately enforcing the laws, the executive department is supreme, and the other departments must obey. For the purpose of construing the laws, and of determining controversies, the courts are supreme and the other departments must obey. But the executive can enforce the statutory laws only as the legislature has enacted them, and, where the courts have construed the laws, (statutory or constitutional,) in the determination of controversies, the executive department can enforce them only as thus construed, and is bound to see that the laws are thus construed, and the judgments or orders of the court rendered or made in the determination of controversies, are respected and obeyed. And will not the executive department do it? Will it refuse in any instance? It will thus be seen that while each of the different departments of the government is superior to the others in some respects, yet that each is inferior to others in other respects, and it is always difficult to compare things which are wholly unlike each other, or to call them equal. Each department in its own sphere is supreme. But each outside of its own sphere is weak and must obey. It will be readily admitted that the courts cannot control any executive act of the governor, or any executive power conferred upon him. But may they not control ministerial power wherever placed? Is not ministerial power inferior to judicial power always, and subject to judicial control? The recipient of ministerial power exercises no judgment, no

discretion, but is simply bound to obey the law, under a given state of facts, and to construe this law, and to ascertain these facts, are peculiarly within the province of the courts. If an applicant for relief on the ground of refusal to exercise or the wrongful exercise of ministerial power by the governor, has no remedy in the courts, then he has no remedy at all. The remedy of impeachment, and the remedy of subsequent elections, suggested by some of the courts, may be a remedy to the public in general, but it cannot be a remedy to an individual sufferer, for injuries or loss in person or to his property. In the case of *Marbury v. Madison*, 1 Cranch. (U. S.) 137, Chief Justice Marshall uses the following language: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection." And further on in the same case, p. 161, after stating that the courts cannot control executive discretion, the great chief justice uses the following language: "But when the legislature proceeds to impose on that officer, (the secretary of state of the United States,) other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts,—he is, so far, the officer of the law; is amenable to the law for his conduct; and cannot, at his discretion, sport away the rights of others." In the case of *Tenn. R. Co. v. Moore*, 36 Ala. 382, the following language is used: "All this is the result of the just and wholesome principle that no public functionary, whatever his official rank, is above the law, or will be permitted to violate its express command with impunity. While, therefore, it is true that, in regard to many of the duties which belong to his office, the governor has, from the very nature of his authority, a discretion which the courts cannot control, yet in reference to ministerial duties imposed upon him by statute which might have been devolved on another officer if the legislature had seen fit, and on the performance of which some specific private right depends, he may be made amenable to the compulsory process of the proper court by *mandamus*." In the case of *Ferguson v. Earl of Kinnoul*, 9 Cl. & Fin. 290, Lord Brougham uses the following language: "But where the law neither confers judicial power, nor any discretion at all, but requires certain things to be done, everybody, whatever be his name, and whatever other functions of a judicial or of a discretionary nature it may have, it is bound to obey." Of course we should always presume that the governor intends to do his duty, but he may be mistaken as to the law, or he may be insufficiently advised as to the facts upon which the applicant for relief founds his right thereto, and there is no way prescribed by law by which issues can be made up and tried before the governor, as issues are made up and tried before the courts. The courts are created for

the express purpose of trying controversies, while the other departments and ministerial officers are not. It is also claimed that if the courts may control the ministerial acts of the governor, and may also determine which are ministerial acts and which are not, then that the courts may determine everything, and obtain complete control over the executive department, including the governor. It must be remembered however, that all controversies must be determined somewhere, and that the courts are the only tribunals created by the constitution and the laws for the special purpose of construing the constitution and the laws, and of determining controversies between parties; and the power to determine whether a given power is a ministerial power or not, and whether an applicant for relief in any particular case has a right to such relief, under the law creating such power, or not, comes peculiarly within the province of the courts. And a determination in such a case is purely judicial, and is one of the things for which courts are created, and they could not refuse their aid in such cases without so far abandoning their duties, and abdicating their jurisdiction. As to the question whether the courts may control the ministerial acts of the governor, many of the cases, cited for the purpose of showing that they cannot, are not applicable, for no such question was involved in the facts of such cases. For instance, in the case of Vicksburg R. Co. v. Lowry, 61 Miss. 102, a writ of mandamus was prayed for only as against the state treasurer, and no relief of any kind was sought as against the governor. In the case of Low v. Towns, 8 Ga. 372, the following language is used: "If, as has already been remarked, it was competent for the legislature to impose this ministerial duty, of issuing a commission to a clerk, on the executive officer of the government, wholly independent of, and in addition to the duties devolved upon that officer by the constitution, why may he not, when the performance of this ministerial act, so required by the law, is essential to the enjoyment and completion of individual rights, be considered, *quoad hoc*, not an executive, but as a ministerial officer, and therefore liable to be directed and compelled to perform the act by mandamus? Viewed as strictly a legal question, we cannot offer any satisfactory reason why he should not, according to the general principles of law." The writ of mandamus asked for in that case was refused because of the want of the necessary facts to entitle the relator to it. In the case of People v. Governor, 29 Mich. 320, 322, 324, an application was made for a writ of mandamus to compel the governor to issue a certain certificate when he should be satisfied that certain work had been done in conformity with the law. In that case the following language is used in the opinion of the court: "If we concede that cases may be pointed out in which it is manifest that the governor is left to no discretion, the present is certainly not among them, for here, by the law he is required to judge on a

personal inspection of the work, and must give his certificate on his own judgment, and not on that of any other person, officer, or department." In the case of Hartranft's Appeal, 85 Pa. St. 433, it was sought to compel the governor to disclose state secrets belonging only to the political department of the government. In the case of State v. Governor, 25 N. J. Law, 331, 343, 344, 348, a writ of mandamus was asked for to compel the governor to issue a commission to the relator, but there was no showing made that the relator had ever demanded the commission, or that the governor had ever refused the same, and the court held "that the applicant upon the facts disclosed, is not entitled to the relief sought for," and also held that the court was "asked to direct that the commission be issued in direct conflict with the plain requirements of the act," which of course could not be done. In the case of Mauran v. Smith, 8 R. I. 192, 222, it was rightly held that whether the court had jurisdiction over any act of the governor or not, still that, upon the facts of that case, the relator was not entitled to the relief sought. These cases are given merely as illustrations of the inapplicability of many of the cases cited to show that the courts have no jurisdiction to control the ministerial acts to be performed by the governor. On the other side, what is said in the case of Chamberlain v. Sibley, 4 Minn. 309 (Gil. 228) as to the power of the courts to control ministerial acts of the governor, is only a dictum. Upon the whole, however, if all the cases cited, except such as necessarily included the question whether the courts may in any case control the ministerial acts of the governor, be excluded, and if only such cases be considered as include the above question, then not only reason, but the weight of authority, we think, will be found on the affirmative of the question. And certainly, as to all the executive officers, except the governor, the great weight of authority, state and federal, is in favor of the theory that ministerial acts to be performed by an executive officer may be controlled by the judiciary. If we are correct in our conclusions, then we have jurisdiction to hear and determine the present case upon its merits. We have jurisdiction to determine whether the acts of the governor sought to be controlled in the present instance are ministerial acts, or acts of some other kind or character, and we have jurisdiction to determine whether the facts of the present case authorize the relief sought.

We are really, however, considering two cases. The first presents to us the question whether the judge of the district court at chambers erred or not in granting a preliminary or temporary injunction, an injunction *pendente lite*. The other case is mandamus, brought originally in this court, and it is submitted to us on a motion to quash the alternative writ, and the question presented is whether the alternative writ states facts sufficient to constitute a cause of action in mandamus, and within the jurisdiction of this court. It

will therefore be seen that, after deciding that we have jurisdiction of such cases, any further decision in either case, will only be a decision of a preliminary or interlocutory character. After deciding that we have jurisdiction, then the remaining questions to be determined are whether the acts of the governor, in the organization of the new counties, are ministerial or not, and whether the facts stated in either case are sufficient to authorize the relief sought. In the case of *State v. Commissioners*, 12 Kan. 441, 445, decided at the January term of this court in 1874, it was held that the acts of the governor in the organization of new counties, under the statutes as they then existed, were ministerial. Since that time the statutes have been materially changed, in many particulars. The following provisions are new, and they are now in force: "§ 3. That whenever the governor shall have any reason to believe that any memorial, affidavits in the census enumeration or petition, or any of the proceedings required in section one of this act, are incorrect, fraudulent or untrue, he is authorized and required to delay or refuse to issue his proclamation, and to institute an investigation by sending three disinterested householders of this state into such county, to ascertain the truth or the falsity of such petition, census, memorial, or affidavits, and to order the attorney general to commence proceedings in the name of the state against any and all persons who may be guilty of a violation of any of the provisions of this act, or of any and all persons who may conspire together for the formation of any county fraudulently under this act." Laws 1876, c. 63, § 3; Comp. Laws 1885, par. 1402. "The census taker shall register upon the said duplicate schedules, opposite the names of each legal voter, his election for temporary location of county seat, which shall be taken by the governor as a definite expression of said voter, unless there shall be evidence before him that said list has been tampered with and changed." Laws 1887, c. 128, § 1. Now, while many of the duties imposed upon the governors in the organization of new counties, and possibly all of them except certain ones prescribed by the new provisions above quoted, are still ministerial, yet some of these duties prescribed by these provisions are certainly not ministerial. Some of them relate to the investigation of supposed frauds, and precisely that kind of fraud which we are asked to investigate in the injunction case, and clearly such duties are not ministerial. Hence, as some of the duties imposed upon the governor in the organization of new counties are ministerial, and some of them are not, and, as the courts will not by mandamus or injunction control any of the acts of officers except such as are purely ministerial, and will not control even those whenever any other plain and adequate remedy exists, it follows that it must be shown clearly and conclusively in the particular case, that the acts of the governor sought to be controlled are not only pure ministerial acts, but also that no other plain and adequate

remedy exists. Also, as we have already stated, all presumptions are in favor of the good faith and honesty of the governor. It will not only be presumed that he has in the past performed honestly all his duties, but it will be presumed that in the future he will faithfully and honestly perform the same; and these presumptions will continue until it is clearly, conclusively and affirmatively shown otherwise; and, in favor of the chief executive officer of the state, these presumptions should be considered as of the strongest character; indeed, much stronger than any kindred presumptions in favor of inferior officers. These new provisions will not only affect the actions of the governor in many cases, but may also affect the action of the courts in particular cases. Whenever, in the organization of new counties, the governor delays or neglects to act upon the return of the census taker, it must be presumed that some complaint or notice of fraud or illegality has been brought to the notice of the governor, and that he delays action for the purpose that an investigation may be had; and the courts should not, by mandamus or otherwise, require the governor to act until it is affirmatively alleged and shown that no sufficient reason exists for such delay. No allegation of this kind is to be found in the alternative writ of mandamus in the present mandamus case, and hence the alternative writ is defective and insufficient. Also, when the governor is about to act on the return of the report of the census taker, it must be presumed that no complaint or notice of fraud, or other illegality worthy of attention, has been brought to the attention of the governor: and before the courts should attempt to restrain the governor from acting on such return or report it should be affirmatively alleged and shown that a complaint of fraud, or other illegality worthy of notice had been brought to the attention of the governor, and that he then ignored and disregarded such complaint. Also, as a general rule, all persons in cases of fraud, or other illegality, in the organization of counties, have a plain and adequate remedy by resorting to the investigation provided for in § 3, above quoted. If complaints of fraud or illegality have been made, an investigation may be had at once under that section, and, in the investigation that ensues, all parties have a plain and an adequate remedy. In the present mandamus case no allegation is made that no complaints of fraud or illegality were brought to the attention of the governor, or that the governor is not delaying for the purpose that an investigation may be had; hence for this reason the alternative writ is insufficient. In the injunction case no allegation is made that any fraud or illegality, or even irregularity of any kind has ever been brought to the attention of the governor, or that he would fail to regard the same if it were brought to his attention; hence the petition for the injunction is insufficient for that reason. If the fraud and other irregularities alleged in the injunction case, had been brought to

the attention of the governor, and he asked to inaugurate an investigation under said § 3, he would undoubtedly have done so. At least, it must be so presumed in the absence of allegations to the contrary. Before parties can resort to the courts for a mandamus or an injunction, they must exhaust their other remedies, provided their other remedies are plain and adequate. This, the plaintiffs in the two cases we are now considering, have failed to do. They have wholly ignored a plain and adequate remedy.

The motion to quash the alternative writ of mandamus will be sustained, and the order of the judge of the court below granting a temporary injunction, will be reversed.

All the justices concurring.

In accord.—*Harpending v. Haight*, 39 Cal. 189; *Tennessee R. R. Co. v. Moore*, 36 Ala. 380; *Chumaseo v. Potts*, 2 Mont. 242; *Cotten v. Ellis*, 7 Jones (N. Car.) 545; *State v. Governor*, 5 Ohio St. 528; *Magruder v. Swan*, 25 Md. 212; *Chamberlain v. Sibley*, 4 Minn. 309.

The following states appear to hold to the doctrine that Mandamus lies to the governor to compel the performance of duties not of a political character wherein there is nothing of discretion, and which duties are expressly imposed by statute: *Alabama* (*Tennessee R. R. Co. v. Moore*, 36 Ala. 371); *California* (*Harpending v. Haight*, 39 Cal. 189); *Colorado* (*Greenwood Land Co. v. Routt*, 17 Colo. 156); *Kansas* (*Martin v. Ingham*, 38 Kan. 641); *Louisiana* (*State v. Nichols*, 42 La. Ann. 209); *Maryland* (*Groome v. Gwinn*, 43 Md. 572); *Montana* (*Chumaseo v. Potts*, 2 Mont. 242); *Nebraska* (*State v. Thayer*, 31 Neb. 82); *Nevada* (*State v. Blasdell*, 4 Nev. 241); *New Hampshire* (*Barnard v. Peoples Ins. Co.*, 66 N. H. 400); *North Carolina* (*Cotten v. Ellis*, 7 Jones (N. Car.) 545).

In the following states the doctrine obtains that as to all official duties, the executive of the state is entirely removed from beyond the power of the courts: *Arkansas* (*Hawkins v. Governor*, 1 Ark. 571); *Arizona* (*Board v. Wolfey*, 22 Pac. 383); *Florida* (*State v. Drew*, 17 Fla. 67); *Georgia* (*Low v. Towns*, 8 Ga. 360); *Illinois* (*People v. Cullom*, 100 Ill. 472); *Indiana* (*Horey v. State*, 127 Ind. 588; *contra*, *Gray v. State*, 72 Ind. 567); *Maine* (*In re Dennett*, 32 Me. 508); *Michigan* (*People v. Governor*, 29 Mich. 320); *Minnesota* (*Rice v. Austin*, 19 Minn. 103); *Mississippi* (*Vicksburg, etc., R. R. Co. v. Lowrey*, 61 Miss. 102); *Missouri* (*State v. Governor*, 39 Mo. 388); *New Jersey* (*State v. Governor*, 1 Dutch. 331); *Pennsylvania* (*Commonwealth v. Wickersham*, 90 Pa. St. 311); *Rhode Island* (*Mauran v. Smith*, 8 R. I. 192); *Tennessee* (*Turnpike Co. v. Brown*, 8 Baxt. (Tenn.) 490).

The latter doctrine is undoubtedly the correct as well as the safe one. It can hardly be supposed that the founders of our State designed any other legal control over the Chief Executive than that furnished by impeachment.

In a few of the states other state officers have been declared to be beyond control by Mandamus but the weight of authority negatives this doctrine, holding that the courts have power to compel the performance of ministerial duties. *Ex parte Pickett*, 24 Ala. 91; *Bryan v. Cattell*, 15 Iowa, 538; *State v. Johnson*, 28 La. Ann. 932; *People v. Hospital*, 39 N. Y. S. 158; *Houge v. Baker*, 92 Tex. 58.

The rule which invariably applies to these cases lies in the determination of whether the duty sought to be coerced is discretionary or purely ministerial.

5. Mandamus to legislative officers.

EX PARTE ECHOLS.

1866. SUPREME COURT OF ALABAMA. 39 Ala. 698, 88 Am. Dec. 749.

BY THE COURT, BYRD, J.—This is an application by a member of the house of representatives for a mandamus, or other appropriate process, to be issued, requiring the speaker of the house of representatives to cause a certain “bill, which has passed said house,” to be sent to the senate. It appears from the application that the bill is “a bill to be entitled “An act to create a new county out of the portions of Macon, Russell, and Chambers;” “that the bill was regularly” put upon its passage, on the 14th day of Feb. 1866, in said house, and the vote on said question whether said bill should pass was, on said last named day, taken in the house by yeas and nays, and stood as follows: forty-seven votes for its passage, and twenty-two against its passage; that the speaker of said house, on ascertaining that there were forty-seven votes for the passage of said bill and twenty-two against its passage, announced and decided on said last named day, that said bill was lost, and had not passed, and by virtue of § 2 of art. 2 of the constitution of the state, said bill could not be passed by any number of votes in said house less than sixty-seven in favor of its passage; that an appeal to said house was thereupon taken from the decision of the said speaker, and on said appeal forty-five members voted to sustain said decision and thirty-five voted against sustaining said decision; that the decision of the speaker, and those who voted to sustain said decision on said appeal, was induced and caused solely by the construction they felt it their duty to place upon said section of the constitution; and that by reason of said decision of the speaker, the said bill has been defeated and kept from the senate.”

These are the material facts submitted by the speaker in a written consent and admission attached to the application, and the only ones necessary for our consideration from the view we take of the case. Whether this court has original jurisdiction to issue the writ of mandamus in any case similar to this is not necessary to be considered. Nor is it necessary for us to pass on the question whether the petitioner has such an interest in the subject matter as entitles him to come into this court and ask its aid in controlling the speaker of the house of representatives. But the question we shall consider is, whether this court has the jurisdiction to control the speaker of the house of representatives in respect to the matter complained of.

The speaker decided that the bill had not passed by a vote

of two-thirds of that branch of the legislature; and an appeal was taken from that decision to the house, and the house sustained the decision of the speaker. This was a question certainly within the jurisdiction of the speaker and house to pass upon, and is not a mere ministerial duty, but one that pertains to their legislative functions, and is one over which the house has exclusive jurisdiction. No other department of the government can revise its action in this respect without a usurpation of power.

In *State v. Porter*, 1 Ala. 688, the court says: "That there may be acts of either one or all the branches of the legislature united which cannot be drawn in question before the judiciary, will not be denied. Thus either house may elect its own officers, and the choice cannot be questioned; nor can the exercise of a mere political duty by the legislature, or either of its branches, be in any manner controlled." Nor is there anything in conflict with this in the case of *Ex parte Pickett*, 24 *id.* 91, and *Coosa, etc. R. Co. v. Moore*, 36 *id.* 380, or in any case decided by this court.

This court will not interfere with either of the co-ordinate departments of the government in the legitimate exercise of their jurisdiction and powers, except to enforce mere ministerial acts required by law to be performed by some officer thereof; and not then if the law leaves it discretionary with the officer or the department. To this extent and no further do the decisions of the court go upon this branch of the subject.

In the case of the *United States v. Guthrie*, 17 How. (U. S.) 304, the court says: "Thus it has been ruled that the only acts to which the power of the courts, by mandamus, extends, are such as are purely ministerial, and with regard to which nothing like judgment or discretion in the performance of his duties is left to the officer; but that wherever the right of discretion or judgment exists in him, it is he, and not the courts, that can regulate the exercise." See also *Brashear v. Mason*, 6 How. (U. S.) 92; *Kendall v. Stokes*, 12 Pet. (U. S.) 527; *Decatur v. Paulding*, 14 *id.* 497; *United States v. Lawrence*, 3 Dall. (U. S.) 42; *Life and Fire Insurance Company of New York, v. Adams*, 9 Pet. (U. S.) 573; *State v. Bowen*, 6 Ala. 511; *Page v. Hardin*, 8 B. Mon. (Ky.) 656; *Marbury v. Madison*, 1 Cranch (U. S.) 137; *Commonwealth v. Commissioners*, 32 Pa. St. 223; *Ex parte Morris*, 11 Gratt. (Va.) 297; *Strong, Petitioner*, 20 Pick. (Mass.) 493.

We have examined the cases referred to in the brief of the counsel for the applicant, and find none of them in conflict with the above. It seems to be held by all the authorities that the writ of mandamus can only issue to some officer required by the law to perform some mere ministerial act, or to a judicial officer to require him to take action; but not in a matter requiring judgment or discretion, to direct or control him in the exercise of either. Among

all the cases and text books on this subject, none go to the length of laying down the doctrine that the speaker of the house of representatives, or a legislative body, in a matter arising in the regular course of legislation upon which he is called to decide, can be controlled by this or any other tribunal, except by the one over which he presides; and that having sustained his opinion and action, this court cannot review it. To do so would be in violation of the third article of the constitution, and of principles well established and long settled.

Each department of the government should be careful not to trench upon the powers of others; and this court should be the more so, as its decisions are to be taken as the measure, in the last legal resort, of the powers which pertain to each department thereof; and while it will uphold its own jurisdiction and powers, it will be careful not to usurp any that appropriately belong to either of the other co-ordinate branches of the government.

Neither can the house of representatives be viewed in the light of an "inferior jurisdiction," within the meaning of the second section of article 6 of the state constitution; nor does the speaker of the house come within the meaning of that section when he is acting in his legislative capacity, and not as a mere ministerial officer of the law.

It results from these views that the application is refused; and so let it be entered of record.

Where the duty imposed upon the legislative officer is wholly ministerial, held that Mandamus will lie. *State v. Elder*, 31 Neb. 169.

6. Trying title to office.

STATE EX REL. VAIL v. DRAPER.

1871. SUPREME COURT OF MISSOURI. 48 Mo. 213.

WAGNER, J., delivered the opinion of the court.

The relator asks this court to grant a peremptory mandamus to compel the state auditor to issue a warrant in his favor for salary as judge of the Fifteenth Judicial Circuit, for the fiscal quarter ending on the 30th of June, 1871. The action of the auditor in refusing to draw the warrant is based on the fact that the official register in the office of the secretary of state shows that on the 14th of April, 1871, the governor of this state commissioned Louis F. Dinning to be judge of the said circuit.

The record in the case as made up by the pleadings, shows that both Vail and Dinning trace their title to office under and through

the general election held in 1868. At that election they were both candidates for the judgeship in the Fifteenth Judicial Circuit. The register of civil officers kept in the office of the secretary of state shows that on the 20th day of April, 1869, Governor McClurg commissioned James H. Vail (the relator) Judge of the Fifteenth Circuit, "it appearing to him that he was duly elected on the 3d day of November, 1868." Under this commission Vail qualified and proceeded to discharge the duties and functions of the office, receiving the salary and the emoluments thereof, and has ever since performed the duties of the same.

On the 14th day of April, 1871, about two years after the first commission issued to Vail, Governor Brown commissioned Louis F. Dinning Judge of the same circuit, "it having been certified by the Hon. Francis Rodman, Secretary of State, that he was duly elected November 3d, 1868." It thus appears that there is a contest in the Fifteenth Circuit as to who is the rightful judge thereof. With that contest we have nothing to do in this proceeding, as the right to an office cannot be determined upon an application for a mandamus directed to the auditor for a warrant for a salary, *State v. Mosely*, 34 Mo. 375; 36 Mo. 70; *Winston v. Mosely*, 35 Mo. 146.

No parties are here contesting, and the only question for us to decide is, who is entitled to the salary as the case is now presented? Which of the parties was originally entitled to the commission we do not know, nor are we at liberty to give an opinion. When Governor McClurg, acting upon evidence which he doubtless deemed satisfactory, of Vail's election, issued a commission to him, the executive function, so far as commissioning a judge for that circuit was concerned, was exhausted. The commission invested Vail with the title, and was *prima facie* evidence of his right to the office. It gave him the possession, and he could only be deprived of it or ousted upon due process, in the manner prescribed by law. He exercised its duties and privileges by color of law, and that was sufficient until some other person legally established a better and a higher right.

After the governor had issued his commission, and Vail had qualified and been inducted into office, it was incompetent for any subsequent governor, upon any evidence whatever, to attempt to annul or to revoke that commission and devolve the office upon another. It is true that Governor Brown acted upon the certificate of Mr. Rodman, the former Secretary of State, and the evidence of Dinning's right was doubtless to him conclusive; still, after his predecessor had acted in the course of his official duties upon the same subject, we do not think that by any executive action Vail could be ousted or deprived of his *prima facie* right to the office. Such a proceeding would be the exercise of judicial rather

than executive powers. If an error was committed in the issuance of the commission to Vail, and Dinning was the party fairly and justly entitled to the office, the courts furnished the proper and appropriate means for seeking redress. He should have proceeded at once by *quo warranto* and have settled his claims. This remedy the law points out. To sanction any other course would lead to anarchy and disorder, and we should have the spectacle of two judges holding rival courts, each claiming obedience and authority, and both deriving their power from identically the same source. Such a state of things ought not to exist. There can be but one lawful judge, and the law has made ample provision to ascertain and determine who he shall be.

In the case of St. Louis County Court v. Sparks, 10 Mo. 117, it appears that Sparks was appointed collector of the revenue, and after the expiration of his term, Wise was appointed his successor. Wise qualified and entered upon the performance of his official duties. Sparks was directed to make a settlement with the court, and deliver possession of the office to Wise. This he refused to do, alleging that Wise was ineligible. The marshal by order of the court forcibly ejected him. On this state of the facts he applied to the circuit court for a mandamus to compel the county court to restore him to the office of collector. The only ground on which Sparks claimed the office was that he held until his successor was appointed, and that the appointment of Wise was invalid, he being at the time disqualified.

Judge Scott, in writing the opinion of the court says: "It has been long held that a mandamus may be used to restore a person to an office to which he is entitled (4 Bacon Abr. 500.). But we are not prepared to say that this was a proper case for the interference of the circuit court by mandamus. Various considerations incline us to this opinion. The office was already filled by one who was a *de facto* officer at least; and it appears to be the law that when an office is filled by one who is in by color of right, a mandamus is never issued to admit another person, the proper remedy being an information in the nature of a *quo warranto*, People v. Corporation of New York, Johns. Cas. (N. Y.) 79; Angel & Ames Cor. 565; King v. Mayor of Colchester, 2 Durnf. & E. (K. B.) 259. It would not be just that Wise's right to the office should be determined on a proceeding to which he was no party. He was the proper person to vindicate his own rights, and a *quo warranto* was the proper mode under the circumstances to try the validity of his appointment."

Now it is certain that Vail was a *de facto* officer, that he was in by color of right at least, and when the commission was issued to Dinning, Vail was no party to it, and had no opportunity to be heard. We may repeat the language of Judge Scott, and say that

it would not be just that Vail's right to the office should be determined on a proceeding to which he was no party. He was the proper person to vindicate his own rights, and a *quo warranto* was the proper mode under the circumstances to try the validity of his election and commission.

The auditor was bound to take notice that there was no claim to the office set up by either Vail or Dinning other than was derived under the election of 1868; that Governor McClurg commissioned Vail as having been legally elected at that time, and that Vail qualified and performed the duties of the office, and drew his salary therefor; in other words, that he was *de facto* the judge, holding by color of right, and, as such, entitled to his salary until ousted upon proper proceedings.

This opinion is strictly limited to the case now made, and can have no bearing on any question as to a contest between the parties when their rights are presented for adjudication.

In my opinion a peremptory writ should issue. All of the other judges concur.

See also *Ex parte Lusk*, 82 Ala. 519; *Mannix v. State*, 115 Ind. 245; *State v. Thompson*, 36 Mo. 70; *State v. Camden*, 42 N. J. L. 335; *Meredith v. Supervisors*, 50 Cal. 433; *Morles v. Watson*, 60 Mich. 415; *State v. Sherwood*, 15 Minn. 221; *State v. Taaffe*, 25 Mo. App. 567; *People v. N. Y. Asylum*, 122 N. Y. 190; *Duane v. McDonald*, 41 Conn. 517; *Queen v. Derby*, 7 Ad. & E. 419; *King v. Winchester*, 7 Ad. & E. 215.

Allowed merely for the purpose of swearing in a claimant to office. *People v. Straight*, 128 N. Y. 545.

To compel proper canvassing of election returns. *Ellis v. Commissioners of Bristol*, 2 Gray (Mass.) 370; *State v. Bailey*, 7 Iowa, 390; *People v. Scheilleim*, 95 N. Y. 124; *State v. Berg*, 76 Mo. 136; *State v. Grace*, 83 Wis. 295; *Brown v. Commissioners*, 38 Kan. 436; *State v. Van Camp*, 36 Neb. 91; *Dalton v. State*, 43 Ohio. St. 652.

In a number of states the doctrine that *Mandamus* will not lie to try title to office, has been expressly repudiated on the theory that *quo warranto* is not an adequate remedy since, though it may remove the incumbent, it will not seat the relator. *Lindsay v. Luckett*, 20 Tex. 516; *Harwood v. Marshall*, 9 Md. 83; *Putnam v. Langley*, 133 Mass. 204; *Strong, Petitioner*, 37 Mass. 484.

If the incumbent is made a party to the proceedings, it would seem that there is much merit in the above doctrine. Much will depend, of course, on the extent of the order made in *quo warranto*; in some states such order includes the induction of the successful claimant into the office.

7. Correcting amotion from public office.

ELISHA STRONG, PETITIONER, IN RE.

1838. SUPREME JUDICIAL COURT OF MASSACHUSETTS. 37 Mass. 484.

MORTON, J., delivered the opinion of the court.

Two questions arise upon this application. First, was the petitioner duly elected and entitled to a certificate of his election? Second, if so, has he resorted to the proper remedy for redress?

In the examination of these questions we have looked directly to their legal merits. Fortunately we have not been diverted from this object, by any matters of form or technical difficulties. All parties interested have been duly notified and had full opportunity to be heard. The case has been thoroughly investigated, and ably argued on both sides. The petitioner has stated his claim with sufficient clearness and particularity; and the answers of the examiners admits or states all the facts necessary to a correct decision. We shall therefore proceed immediately to the main questions, without taking further notice of the objections as to matters of detail in the petition or answer.

1. Was the petitioner duly elected a county commissioner? If he was, there is no doubt that he was entitled to the usual evidence of the fact.

(The court concluded that the evidence clearly showed the election of petitioner.)

But it has been contended for the respondents, that the petitioner has mistaken his remedy, and that mandamus will not lie. It was said that his appropriate remedy, if he has any, is by *quo warranto*, and not by mandamus, or at any rate that the *quo warranto* should precede the mandamus.

In every well constituted government, the highest judicial authority must necessarily have a supervisory power over all inferior or subordinate tribunals, magistrates, and all others exercising public authority. If they commit errors, they will correct them. If they refuse to perform their duty, it will compel them. In the former case by writ of error, in the latter by mandamus. And generally in all cases of omissions or mistakes, where there is no other adequate specific remedy, resort may be had to this high judicial writ. It not only lies to ministerial, but to judicial officers. In the former case, it contains a mandate to do a specific act, but in the latter only to adjudicate, to exercise a discretion, upon a particular subject. *Springfield v. Commissioners*, 10 Pick. (Mass.) 244.

Mandamus is the proper process for restoring a person to an office from which he has been unjustly removed. *White's Case*, 2 Ld. Raym. (K. B.) 959, 1004; *Regina v. Baines*, 2 Ld. Raym. (K. B.)

1265; Rex v. Chancellor, *ibid* 1334; Rex v. London, 2 T. R. (K. B.) 177; Rex v. Field, 4 T. R. (K. B.) 125. *So also it lies to admit anyone to an office, a service or a franchise from which he is unlawfully excluded.* 6 Dane Abr. 326; Rex v. Surgeon's Company, 2 Burr. (K. B.) 892; Rex v. Barker, 3 Burr. 1265; (K. B.) S. C. 1 W. Bl. 300; Rex v. Bedford Level Cor., 6 East (K. B.) 356; Rex v. York, 4 T. R. (K. B.) 699, and 5 T. R. (K. B.) 66.

But it is strongly argued by the respondent's counsel, that inasmuch as the office, claimed by the petitioner is now filled by another, who can be removed only by a *quo warranto*, a mandamus will not lie. And, certainly, many of the authorities cited by them, support the position, that a mandamus will not lie to place any one in an office already filled by another, until the incumbent has been removed by a *quo warranto*. The case from 3 Johns. Cas. (N. Y.) 79, *People v. New York*, is directly in point. The court there say, that "where the office is already filled by a person who has been admitted and sworn, and who is in by a color of right, a mandamus is never issued to admit another person." "The proper remedy in the first instance, is by an information in the nature of a *quo warranto*, by which the rights of the parties may be tried."

But notwithstanding the weight and respectability of this and the other authorities cited, there are certainly very many the other way; of which the case of *Dew v. Judges of the Sweet Springs District Court*, 3 Hen. & M. (Va.) 1, is one. Dew applied for a mandamus to the judges, to admit him to the office of clerk. It was objected among other things, that the office was already filled, and the only remedy was by a *quo warranto* against the incumbent. But all of the judges of the Supreme Court of Virginia "agreed clearly, that mandamus was the best remedy." See also 6 Dane, 335, and the cases there cited. Mr. Dane, with whom we concur, says, "On the whole the authorities, English and American, are much in favor of the mandamus, especially the more modern cases."

But the cases relied upon by the respondents, if in no wise shaken or overruled, are clearly distinguishable from the one before us, and may stand as sound law, and yet form no obstacle to the petitioner's application. The cases referred to were applications to be admitted to an office. The petitioner only seeks for a certificate of his election. This, if he obtains it, will not necessarily oust the incumbent or give the petitioner possession of the office. For these purposes he may still have to resort to a *quo warranto*, and possibly before he can get qualified to another mandamus. Two processes may be necessary to enable the petitioner to get possession of the office, the one to establish the legality of his own election, the other to set aside that of the incumbent. They are independent of each other. Both might have been applied for at the same time and proceeded *pari passu*. Had the petitioner first caused the incumbent to be removed, by a

quo warranto, still, without the evidence of his own election, he could not enter into the office. So that if a mandamus be now issued and complied with, he may still be obliged to resort to other legal proceedings before he can get regularly inducted.

The King v. The Mayor, etc., of York, 4 T. R. (K. B.) 699, and 5 T. R. (K. B.) 66, is analogous to the case at bar. An election of a recorder of the City of York was holden, and a certificate was duly given to Sinclair that he was elected. The certificate was to be presented to the King, for the purpose of obtaining his approbation of the election. Withers, the other candidate, applied for a mandamus to the corporation to give him a certificate, he having, as he alleged, a majority of the legal votes, and his opponent having gained the election only by the votes of persons not qualified to vote. An alternative mandamus issued, and afterwards, the return to that one being insufficient, a peremptory one was ordered. Many other cases to the same effect might be cited, but without a further reference to the authorities, we are clearly of the opinion that a mandamus is the proper remedy in this case.

We are aware that this is not a writ of right, but grantable at the discretion of the court; Rex v. Commissioners of Excise, 2 T. R. (K. B.) 385; that inasmuch as it is final and cannot be revised on error or otherwise the court will proceed with great caution in the exercise of so high a jurisdiction; Selwyn's N. P. (6th Ed.) 1062; 1 Chit. Gen. Prac. 791; and that they will not grant it, where there is another adequate specific remedy. 1 Chit. Gen. Prac. 790; Rex v. Chester, 1 T. R. (K. B.) 396; Rex v. Canterbury, 8 East (K. B.) 219. But we have no doubt that the present is a proper case for the exercise of our discretion; and that to refuse to grant the writ would be doing palpable injustice to the petitioner, and defeating the will of a majority of the voters of the county, clearly manifested by their votes, duly and legally evidenced before the proper tribunal. No other remedy can reach the evil. Although a *quo warranto* might remove the illegal occupant, it could not put the legal officer in his place. No civil action could be maintained by the petitioner, because there is no reason to doubt, that the examiners acted *bona fide*, and with a sincere desire to perform their duty correctly and legally. And if it could, it would be a very imperfect and partial remedy.

It cannot be maintained that the decision of the examiners was an act within their legal discretion. Whether their determination as to the reception or rejection of returns, would be deemed a judicial decision, may well be doubted. But nothing can be clearer than that the counting the votes, and ascertaining the majorities and giving the certificates of the result, are mere ministerial acts. They have no discretion in determining which of the candidates shall be elected. It must be the result of pure, inflexible mathematical calculation.

We are therefore all of the opinion, that the petitioner, in first seeking to have the validity of his own election inquired into, pursued a wise and legal course, that the proper remedy is by mandamus, and that justice clearly requires that such a writ be issued. But the usual, if not the invariable practice is, in the first instance to grant it in the alternative form, giving the examiners a further opportunity, either to give the certificate or to return the reasons for refusing it. As the case has been fully heard, they will doubtless adopt the first branch of the alternative, unless facts or reasons occur to them which have not been presented to the court.

Alternative mandamus ordered.

See also, *Ex parte Lusk*, 82 Ala. 519; *Johnson v. Mann*, 77 Va. 265; *Madison v. Korbly*, 32 Ind. 74; *Doyle v. Raleigh*, 89 N. Car. 133; *Singleton v. Commissioners*, 2 Bay (S. Car.) 105; *State v. Watertown*, 9 Wis. 254; *St. Louis County Court v. Sparks*, 10 Mo. 117; *Metsker v. Nealey*, 41 Kan. 122; *Rex v. London*, 2 Term R. 177.

Contra, *State v. Dunlap*, 5 Mart. (La.) 271.

PEOPLE EX REL. YOUNG v. STRAIGHT, CLERK.

1891. COURT OF APPEALS OF NEW YORK. 128 N. Y. 545,
28 N. E. 762.

APPLICATION for a mandamus by the people ex rel. M. A. Young, to compel Chas. Straight, clerk of the village of Wellsburg, to administer to him the oath of office. Mandamus granted, and the respondent appeals.

Per Curiam.—The appellant has refused to administer the oath of office to the respondent, and raises the question of the right to compel him to administer it. The theory of his case, apparently, is that in some way his administration of the oath of office would amount to a decision as to the respondent's title to the office, and, as he denied that there was any legal election of the relator, he could not be compelled to take and to file his oath. But that is not so. By the provisions of the act under which this village was incorporated, every person elected or appointed to office is required to take and file with the clerk of the village an oath of office. By an ordinance of the board of trustees of the village, authority was conferred upon the clerk to administer said oath of office. If applied to for that purpose, he was not called upon to decide as to the legality of the applicant's election or appointment; but, in his ministerial capacity, he was obliged to administer the oath of office, if *prima facie* it appeared that the individual desiring to be sworn had the greatest number of votes at the charter election. Perhaps, too, the clerk

might refuse it if the person was known to be ineligible. At this election, there were 136 votes cast, 66 were for the opposing candidate, O'Brien; 66 for "Morris A. Young"; 1 was for "Morris Young"; 1 was for M. A. Young; 1 was defective; and 1 was blank. If the 68 ballots bearing the name of Young were legal ballots for the relator, Morris A. Young, then he had received a majority of the votes for the office. Whether the votes given for "Morris Young", and "M. A. Young", should be counted for the relator was not a question for the clerk to pass upon when Young applied to him to administer the oath of office. It was sufficient that the return presumptively showed the relator's election. Thereupon he was entitled to have the proper oath administered to him, in order that he might be in a position to assert his legal rights. Upon the question of the propriety of granting the peremptory writ of mandamus, it is sufficient to say that as by the paper in the clerk's possession, signed by a majority of the inspectors of the election, a return was made showing that a majority of the ballots was for the candidate named Young, it presumptively showed his election, and it was the duty of the clerk to administer the oath which the statute requires every officer to take and file. It is not material that the inspectors did not make a certificate as to Young's election to the office. They did sign a paper showing the whole number of votes for each person voted for, and that, as between the candidates O'Brien and Young, a majority were for Young. That paper the clerk had possession of. There was no denial of material facts alleged or established by the relator as to the result of the election appearing from the paper filed with the clerk, or concerning his identity, and hence the issuance of the writ of mandamus to compel the clerk to do his duty was perfectly proper. The order appealed from should be affirmed with costs. All concur.

8. To obtain possession of books and paraphernalia of office.

CITY OF KEOKUK v. MERRIAM.

1876. SUPREME COURT OF IOWA. 44 Ia. 432.

THE plaintiff showed in its petition in substance that the defendant was clerk of the city council of Keokuk, and that by ordinance of said city it was made his duty to act as collector of said city, and keep appropriate books; that in the discharge of his duties as said collector he kept a cash book; that by ordinance it was provided that the mayor should have general supervision of all the city officers, and should, as often as he deemed necessary, examine into the

condition of their respective offices, the books, papers and records therein; that the mayor deemed it his duty to examine into the condition of the office of the clerk and the books and the records therein, and demanded of the defendant the said cash book, and that the defendant refused to allow the mayor to examine the said cash book.

The plaintiff prayed in his petition for a writ of mandamus commanding the defendant to turn over to the plaintiff the said cash book, and allow the mayor and city council free access to the books, papers and records of his office.

The defendant answered, averring in substance, that after the commencement of this action, he resigned his office, and that his resignation was accepted; that one Curtis had been elected and qualified as clerk; that he had turned over to Curtis all the books and papers pertaining to his office; that he had never withheld from the constitutional authorities of said city of Keokuk any cash book which said city had a right to investigate; that he was not amenable to the proceedings in mandamus, because the plaintiff had an adequate remedy by replevin; that the city of Keokuk had no authority to provide that the clerk of the city council should act as collector; and that since he had passed out of office, the city council had made a full settlement with him and paid him the balance due him.

The plaintiff demurred to so much of the answer as set up the defendant's resignation, and to so much as alleged that plaintiff had an adequate remedy by replevin.

The defendant moved to strike the demurrer from the files, because the same was not filed in time; which motion, so far as the record shows, was not passed or ruled on.

The court sustained the demurrer to which the defendant excepted.

The court then made the following finding and order: "I find it was the duty of B. S. Merriam, as clerk of the city of Keokuk, to keep an account of the receipts of the delinquent taxes, and the payments of redemptions. Also an account of the payment to purchasers at tax sales of real estate, and that the book in question is the book in which those accounts were kept by the defendant, as clerk of the council and the book also contains a cemetery account, and is the book from which was copied the cemetery account, copied in this book, marked 'Exhibit B', and, being the book showed by Mr. Merriam to the mayor and finance or investigating committee, and shown in part, and he refused to deliver the same; this demand and refusal was before the commencement of this suit.

"It is therefore ordered and adjudged by this court, that defendant B. S. Merriam be commanded, and is hereby commanded, to deliver said book to the clerk of the city council of said city of Keokuk, within forty days from this date.

The court further orders that said books be presented to this court

at the next term thereof, for such other order as the court may then make, and that defendant pay costs of this proceeding." Defendant appeals.

ADAMS, J.—I. The appellant assigns as the first error, the overruling of the motion to strike the demurrer from the files. But as the record shows no ruling upon the motion, we must presume it was waived.

II. It is claimed that the court erred in sustaining the demurrer. The part of the answer referred to showed the defendant's resignation, and the election and qualification of his successor. Such facts alone would not constitute a defense. If the defendant still withheld the books of the city, he was omitting to perform a duty which the law imposed upon him.

In one view, the averments as to his resignation and the election and qualification of his successor were proper. They were followed by an averment that he had turned the books of his office over to his successor. If his averments as to his resignation and the election and qualification of his successor were to be taken simply as showing that he had a successor, and as introductory to showing that he had turned the books over to his successor, we should think the court erred in sustaining the demurrer to that part of the answer; but the averments are all made and numbered in separate subdivisions of the answer; and we infer from appellants argument that he relied upon the fact of his resignation as a sufficient defense of itself.

The other portion of the answer demurred to is the statement that the plaintiff had an adequate remedy by replevin. We think such remedy would not be adequate. If the books could not be found, the plaintiff could only have obtained judgment for their value, and it might have been impossible to show their value. We should deem it very unsafe to hold that where a municipal officer conceals or withholds the books of the corporation, possibly to cover his own defaults, the only remedy of the corporation is by replevin. We do not understand that it is claimed by the appellant that mandamus will not be proper in such a case if the defendant is still in office. But it is said that the defendant being no longer in office, he was not amenable to mandamus. Mandamus is the proper remedy to compel the performance of an official duty. At the expiration of a term of office, it is the official duty of the officer to surrender the books of his office. The duty, we think, so far as the remedy for its enforcement is concerned, does not become less an official duty because it is neglected until the office has expired.

Affirmed.

See also, *Nelson v. Edwards* 55 Tex. 389; *State v. Johnson*, 29 La. Ann. 399; *Walter v. Belding*, 24 Vt. 658.

9. To compel acceptance of office and discharge of official duties.

PEOPLE, EX REL. GERMAN INSURANCE CO., v. WILLIAMS.

1893. SUPREME COURT OF ILLINOIS. 145 Ill. 573, 33 N. E. 849.

PETITION for mandamus by the people of the state of Illinois, on the relation of the German Insurance Company, to compel Thomas C. Williams to assume the duties of town clerk. Granted.

The other facts sufficiently appear in the opinion of SHOPE, J.

This is an original proceeding in this court for mandamus to compel the respondent, Thomas C. Williams, to accept, assume and take upon himself, and execute the office of town clerk of the town of Mt. Morris, in the county of Ogle, in this state; to take and subscribe the oath of office; and to file such oath in the office of the town clerk. The petition shows that on the 31st day of March, 1891, the board of town auditors of the town of Mt. Morris, in said county, acting under a peremptory writ of mandamus of this court, audited and allowed to the relator in this proceeding the sum of \$45,050, as indebtedness owing by said town upon its bonds belonging to the relator, and made a certificate thereof in conformity with the statute. It is then alleged that the town clerk of said town had absconded from the state of Illinois, and there being no town clerk of said town then present, and the justices of the peace of said town, and the supervisors thereof, having failed and neglected to fill the vacancy of town clerk in said town by appointment, the said board of auditors did not, nor could, deliver said certificate to the town clerk, of the town, to be by him kept as required by law, and the aggregate amount thereof to be certified by the town clerk to the county clerk of said Ogle county, as required by law in such cases. The petition then shows that at the annual town meeting held in 1891, a town clerk of said town was elected, but the person so elected, neglected and refused to qualify as by law required. The petition alleges further that, after the failure of the elected town clerk to qualify as aforesaid, there was sued out of this court an *alias* peremptory writ of mandamus, directed, among others, to the supervisor of the town, of Mt. Morris, the town clerk, the justices of the peace of said town, commanding them, as they had theretofore been commanded, that they immediately, without further excuse or delay, do every act and thing devolving upon them by law, as such officers, for the levy, collection and payment of a tax sufficient to pay the amount of said claim, etc., and that they certify obedience, etc.; that said writ was served upon all of said officers, except the town clerk; that thereafter divers and sundry persons eligible to said office were, and have been by the justices of the peace and supervisors of said town, duly and successively appointed to said office of town clerk of said town,

and duly notified thereof, all of whom have neglected and refused to accept, qualify and serve said office, as required by law; that no annual town meeting or election whatever has been held in said town since the annual meeting of 1891; that no town clerk has been elected, said office remaining vacant; that a *pluries* writ of mandamus issued, but that said office of town clerk remaining vacant, said *pluries* writ cannot be served on that officer, but remains in the hands of the sheriff, awaiting the filling and incumbency of that office, to be served. The petition shows that since the audit, allowance, and certification of said \$45,050, was made, the said board of town auditors of said town have audited and allowed the further sum of \$2,650, to the relator, as interest upon the said bonds, in addition to said previous suit and allowance. The petition further alleges that, there being a vacancy in the office of town clerk of said town, on the 17th day of September, 1892, the justices of the peace of said town, and the supervisor thereof again met on that day in said town, for the purpose of filling said vacancy in said office, and by their warrants, under their hands and seals, appointed one Thomas C. Williams, who for more than ten years last past had been a resident of said town, and who had been on said day a legal voter, and had been for five years or over next before his said appointment; that said board of appointment forthwith notified him of his said appointment, but that the said Thomas C. Williams has hitherto neglected and refused to accept said office, and take and subscribe the oath that is required by law, whereby said office of town clerk has continued to be vacant. It is then alleged that, because of their being no town clerk of said town, the said certificate of audit so made by the board of town auditors, cannot be delivered to the clerk of said town, to be by him kept, etc., nor can the aggregate amount thereof be certified to the county clerk of the said county at the same time and in the said manner as other amounts required to be raised for town purposes in said town to be levied and collected as other town taxes, as is by law required, whereby the relator is unable to obtain the levy and collection of a tax upon the property of said town, wherewith to pay the amount so audited and allowed. The prayer is that, as ancillary to the original proceeding before mentioned, wherein the said several peremptory writs issued have proved unavailing, by reason of there being no town clerk upon which to serve the same, a writ of mandamus be now here awarded, commanding said Williams to accept, assume, and take upon himself said office, etc. The respondent filed a general demurrer to the petition.

SHOPE, J. (after stating the facts.)

The principal question is whether mandamus will lie to compel the acceptance of a municipal office by one who, possessing the requisite qualification, has been duly elected or appointed to the same. It is stated by text writers that no case has arisen in this

country involving this precise question, *Merrill Mand.*, § 145, *Dillon Mun. Cor.* § 162, and in the researches of counsel, and our own examination, none have been found. There are, however, a number of analogous cases where similar questions, involving the same principle, have been elaborately discussed and determined in the state and federal courts. Very many English cases are found where it has been held that it was a common law offense to refuse to serve in a public office, to which one had been elected or appointed under competent authority, and that mandamus will lie in that case to compel the taking of the official oath, and entering upon the discharge of the public duty. It is objected that these cases do not show that mandamus would lie, for the refusal to accept public office, prior to the fourth year of James I. If the contention be true, it is unimportant whether the particular remedy was by mandamus, by the ancient common law, or not. The important subject of inquiry is whether it was a common law duty to accept and discharge the duties of a public municipal office. The writ of mandamus was in use as early as the fourteenth and fifteenth centuries. *Rex v. University, Fortes.* (K. B.) 202; *Rex v. Gower*, 3 Salk. (K. B.) 230. It appears from Dr. Widdrington's case (A. D. 1673), 1 Lev. (K. B.) 23, that mandamus had been in use as early as in the time of Edward II and Edward III, between 1307 and 1377. Originally it was a letter missive from the sovereign power, commanding the party to whom it was addressed, to perform the act or the duty imposed. Later it obtained sanction as an original writ emanating from the king's bench, where, by fiction of law, the king was always present. But it does not seem to have been frequently used, nor adopted as the remedy to compel the acceptance of office, until late in the seventeenth century. In modern time the uses of the writ, and the purposes to which it will be applied, have been greatly enlarged and it has come into general use where there is a legal duty imposed, and no other remedy is provided by law for a failure to discharge it; and in many other cases, against those exercising an office or a franchise, where there may be another remedy, but it is less direct and effective. In this state, as in most if not all the states of the union, the proceeding is regulated by statute. Chap. 87, R. S. The common law of England, so far as the same is applicable and of a general nature, and all statutes or acts of the British parliament, made in aid of, and to supply the defects of the common law, prior to the fourth year of James I. (excepting certain statutes), and which are of a general nature, and not local to that kingdom, are by our statutes made the rule of decision until repealed by the legislature. Thereby the great body of the English common law became, so far as applicable, in force in this state.

It is held in numerous English cases that by the common law it was the duty of every person having the requisite qualifications.

elected or appointed to a public municipal office, to accept the same, and that a refusal to accept such office was punishable, at the common law. The case of *Rex v. Lone*, 2 Stra. (K. B.) 920, was an indictment for refusal to execute the office of constable by one who had been chosen to it, and it was held that he was indictable by the common law. *Rex v. Jones*, *id.* 1145, was an indictment for not taking upon himself the office of overseer of the poor. It was held that the offense was indictable upon the principles of the common law. See *Rex v. Burder*, 4 T. R. (K. B.) 778. *Rex v. Larwood* (A. D. 1695), 4 Mod. Rep. (K. B.) 270, was an information against the defendant for refusal to take the office of sheriff, to which he had been duly appointed. The defense was that the defendant, being a dissenter, had not taken sacrament within a year before he was chosen, and so his appointment was void, under 25 Car. I, c. 2; 30 Car. I, c. I, disabling Papists, etc. It was held that it was the fault of the defendant not to have received the sacrament, and that his neglect of duty was no excuse, and that he was liable, etc. In *Vanacker's case* (A. D. 1700), 1 Ld. Raym. (K. B.) 496, it was held that the city of London, a municipal corporation, of common right possessed authority, by by-law of the corporation, to impose penalties for refusal to accept office; Lord Holt remarking that, "if a franchise be granted to a corporation, it is under a trust that the corporation shall manage it well." * * * The acceptance of the charter obliges the body politic to perform the terms upon which it was granted, and, as every citizen is capable of the benefit of the franchise, so he ought to submit to the charge, also. * * * And therefore as they have advantage by some franchises, so they ought to submit to the charges of others. * * * Therefore it is necessary that they should have coercive power to compel the persons to take the office upon them, and that without any custom, otherwise this office might be lost to the city." *King v. Raines*, 3 Salk. (K. B.) 162. About the beginning of the eighteenth century, the English courts adopted mandamus in such cases, as it would seem, and the practice has since been followed. *Queen v. Hungerford* (decided in 1708), 11 Mod. (K. B.) 142, was an information in the nature of a *quo warranto*, against a common councilman of Bristol, for refusing to take upon himself the office, etc. The remedy was denied, but it was said, "If they had applied to the court for mandamus, they should have had it." *King v. Bower*, 1 B. & C. (K. B.) 585, was mandamus to compel the defendant to take the oath, and to take upon himself and execute the office of common councilman for the borough and town of Lancaster. The court said: "It is an offense at common law to refuse to serve an office, when duly elected," and refused to hold that the payment of a fine imposed by by-law of the corporation discharged the obligation to accept and hold the office, and a peremptory writ was issued. See *Rex v. Bedford Corp.*, 1

East (K. B.) 53; Rex v. Mayor, etc., 2 B. & C. (K. B.) 261; Clark v. Sharum, 1 Str. (K. B.) 1081; Pelson's case, 2 Lev. (K. B.) 252; Vintner's Co. v. Passey, 1 Burr. (K. B.) 339; Rex v. Grosvenor, 1 Wils. (K. B.) 18; Rex v. Whitwell, 5 T. R. (K. B.) 86; Rex v. Leyland, 3 M. & S. (K. B.) 184.

Further citation from cases will not be necessary. So uniformly has the doctrine been maintained that there is a legal duty to accept an office when duly elected or appointed, in a public or municipal corporation, and that mandamus is an appropriate remedy in all cases of refusal, that it is accepted by all the text writers. Thus Mr. Grant (Law of Corporations, p. 230) states the rule:—"On the other hand, when, not being exempt or disqualified, a man is duly elected to an office, the court, if the corporation is a public one, and the office of a sufficiently important nature to justify its interference, and in all cases where the office is connected with the administration of local jurisdiction vested in the corporation, or the administration of justice, will interfere by mandamus, to compel him to take upon him, and serve, the office." To the same effect see Willc. Mun. Cor. 128; Mechem Pub. Off., § 243; High Extr. Rem., § 334; Shortt Information, 324-328; Tapping Man., 189. In Merrill Man., § 145, it is said: "A party who has been elected to an office owes a duty to the public to qualify himself therefor, and to enter upon the discharge of his duties. Such duty being incumbent on him by law, he may be compelled by the writ of mandamus to assume the office, and take upon himself the duties thereof. Though he may be subject to an indictment or fine for failure to do so, still the writ of mandamus will be granted, because neither the indictment nor the fine is an adequate remedy in the premises, since it does not fill the office, and prevent a failure of the discharge of the public duties." It follows, necessarily, if to refuse the office is a common law offense, and punishable as such, that a legal duty attaches to the person to take upon himself the office, which may now be enforced by mandamus.

While this class of offices were accepted in England as a burden, they have not been generally regarded so in this country. Under our system of local government, even the smallest offices are generally accepted, either because they are supposed to lead to those that bring higher honors and greater emoluments, or because of a sense of duty. To this fact, and perhaps to the prevalent but mistaken idea that one who is holding a public office may resign at will, is to be attributed the absence of decision upon the precise question in this country. The cases, bearing upon this question, in this country, have ordinarily arisen where the incumbent attempted to resign from a public office; and it has been uniformly held that the power to resign did not exist, or resignation become effective to discharge the officer from the public duty, until accepted by competent and lawful authority. In Edwards v. United States, 103 U. S. 471, Edwards

had been elected supervisor of the town of St. Josephs, Berrien County, Mich., on April 3, 1876, and entered upon the duties of his office, and on the 7th of June following resigned in writing, and filed the same with the town clerk. No action upon the resignation was alleged to have been taken by the township authorities, and the question was, "Was the resignation complete without an acceptance of it, or something tantamount thereto, such as the appointment of a successor?" The court held that it was not, and says, "In England, a person elected to a municipal office, was bound to accept it, and perform its duties, and he subjected himself to a penalty by a refusal. An office was regarded as a burden which the appointee was bound, in the interest of the community and good government, to bear." And it is said that it follows from this, as a matter of course, that, after the office was assumed, it could not be laid down at will; and, that court holding that the common law rule prevailed in Michigan, the judgment awarding a peremptory writ compelling the performance of the duty as supervisor, etc., was affirmed. In the case of *Hoke v. Henderson*, 4 Dev. (N. Car.) 1, it is said, in passing upon the question there at issue,—“An officer may certainly resign, but without acceptance his resignation is nothing, and he remains in office. It is not true that the office is held at the will of either party. It is held at the will of both.” And after saying that the acceptance of resignations, in respect of lucrative offices has been so much a matter of course, that it has become the common understanding that to resign is a matter of right, but the law is otherwise, it is said: “The public has a right to the service of all the citizens, and may demand them in all civil departments, as well as the military.” In *State v. Ferguson*, 31 N. J. L. 107, the question was whether the respondent, at the time of the service of the writ of mandamus, was an overseer of highways, etc. The respondent proved that before the service of the mandamus, he had sent in his resignation of said office, on which certain of the township committee had endorsed acceptance. It was insisted that the officer had a right to resign at will, and that the mere notification of the proper officers of the fact relieves him from performance of the official duty. The chief justice, after reviewing the common law authorities, says: “I think it undeniable, therefore, that upon the general principles of law, as contained in the judicial decisions of the highest authority, the refusal of an office of the class to which the one under consideration belongs was an offense punishable by a proceeding in behalf of the public. Regarding then, the doctrine of the law as established, it seems to be an unavoidable sequence that the party elected, and who is thus compelled, by force of the sanction of the criminal law, to accept the office, cannot afterwards resign it *ex mero motu*. If his recusancy to accept can be punished, it cannot be that he can accept, and immediately afterwards, at his own pleasure, lay down the office.”

The same principle has been announced more or less directly in *Van Orsdall v. Howard*, 3 Hill. (N. Y.) 243; *London v. Hedden*, 76 N. Car. 72; *Winnegar v. Roe*, 1 Cow. (N. Y.) 258; *People v. Supervisors Barnett Tp.*, 100 Ill. 332; *Badger v. United States*, 93 U. S. 599. The reason assigned in *Rex v. Larwood*, 1 Salk. (K. B.) 168, for the public duty is "that the king hath an interest in every subject, and a right to his service, and no man can be exempt from the office of sheriff but by act of parliament or by letters patent." In a republic the sovereign power rests in the people; to be expressed only in the forms of law; and if the duty, preservative of the common welfare, is disregarded, society may suffer great inconvenience and loss before, through the methods of legislation, the evil can be remedied. Upon a refusal of officers to perform their functions, effective government *pro tanto* ceases. In civilized and enlightened society, men are not absolutely free. All citizens owe the duty of aiding in carrying on the civil departments of the government. The burden of the government must be borne by the citizen as a contribution in return for the protection afforded. The sovereign, subject only to self-imposed restrictions and limitations, may, in right of eminent domain, take the property of the citizen for the public use. He is required to serve on juries, to attend as a witness and, without compensation, is required to join the *posse comitatus* at the command of the representative of the sovereign power; and he is required to do military service at the command of the sovereign. In all these, private right and convenience must yield to the public welfare and necessity. It is essential to the public welfare, necessary to the preservation of government, that public affairs be properly administered; and for this purpose civil officers are chosen, and their duties prescribed by law. A political organization must necessarily be defective that provides no adequate means to compel the observance of the obvious duty of the citizen, chosen to office, to enter upon and discharge the public duty imposed by its laws, and necessary to the exercise of the functions of government.

It is admitted by the demurrer that the respondent was legally appointed town clerk of the town of Mt. Morris. The office is connected with, and necessary to, the levy of taxes to carry on the municipal affairs of the town, and the administration of its local jurisdiction. It is shown that there was a public necessity, as well as that the relator had a private interest in the performance of the duties of that office. No election had been held in the town since the annual town meeting of 1891. Numerous persons had been appointed to said office, but it remained vacant, and the duties consequently undischarged. It is admitted by the demurrer, also, that claims against the town in favor of the relator, to a large amount, had been audited by the board of town auditors of said town, and allowed, and certificate thereof duly made, as provided by law, but that the same could

not be delivered to, or filed with the town clerk, because of such vacancy in said office, nor could the aggregate amount thereof be certified to the county clerk of said county, to be levied and collected as other town taxes. It is conceded that the respondent was eligible to the office; that a vacancy therein existed; that he was appointed conformably to the law, and duly notified thereof. §§ 1-3, art. 10, c. 139, Rev. Stat. The statute provides that every person appointed to the office of town clerk, before he enters upon the duties of his office, and within ten days after he shall be notified of his appointment, shall take and subscribe before some justice of the peace, etc., the oath or affirmation of office prescribed by the constitution, and within eight days thereafter file the same in the office of the town clerk. § 2, art. 9, c. 139, Rev. Stat. § 3 of the same article provides that if any person elected or appointed to said office shall neglect or refuse to take the said oath, and cause the same to be filed as aforesaid, such a neglect shall be deemed a refusal to serve. And § 7 of the same article provides:—"If any person elected to the office of town clerk shall refuse to serve, he shall forfeit to the town the sum of \$25." One of the special duties enjoined upon the town clerk is: "He shall annually, at the time required by law, certify to the county clerk the amount of the taxes, required to be raised for all town purposes." § 4, art. 12, c. 139, Rev. Stat. §§ 127, 128, c. 120, Rev. Stat. 1874, provides that the county clerk shall determine the rate percent upon the valuation of the property of towns, etc., that will produce not less than the net amount of the sums certified to him according to law, to be extended by the county clerk upon the equalized valuation of property in said town, etc. The only mode provided by law by which a tax can be levied upon the property of the town for the payment of its debts or current expenses is by the certificate of the town clerk of the town to the county clerk, as thus prescribed. It is apparent therefore that a public necessity exists for the discharge of the public duty.

It is insisted that, the legislature having provided a penalty for the refusal to accept the office, that remedy is exclusive, and that a payment of the penalty imposed was intended to be in lieu of the service. We cannot concur in this view. The purpose of imposing the penalty was to enforce the acceptance of the office, and performance of its duties; and the statute cannot be construed that the person chosen should be discharged from the duty by the payment of the penalty, and thereby the purposes of the creation of the office frustrated, and the public duty remain unperformed. Authorities *supra*. It is to be presumed that, had the legislature intended that the payment of the fine was to be in lieu of the service, they would have so enacted, and, not having done so, the duty remains, notwithstanding the imposition of the fine or the penalty. High Extr. Rem., § 334, *supra*.

It is also insisted that the demurrer should be sustained for the reason that no demand is averred to have been made upon respondent to accept the office, and perform its duties. It is alleged that he was duly, forthwith, notified of his appointment, by the board authorized by law to make the same (§ 3, art. 10, c. 139, Rev. Stat. 1874), and that he refused and neglected to accept the office. Upon being notified, it was his duty, by law, to take and subscribe the oath of office and file the same, and enter upon the discharge of the duties.

Relator was not alone interested, nor did the failure of the respondent to qualify affect its interest only. On the contrary, the duty the performance of which is sought to be enforced, is a public duty, commanded by the public law. The case is therefore clearly distinguishable from one in which, the act sought to be enforced, is for the benefit of some private party. In cases of this class, no formal demand was necessary, as preliminary to the application for mandamus. *People v. Board of Ed.*, 127 Ill. 624, 21 N. E. 187. We are of the opinion that respondent ought to be required to accept the office of town clerk of said town, to which he has been duly and legally appointed, to take and file the oath as such town clerk, as provided by law, and to discharge the duties of said office, and a peremptory writ of mandamus is awarded accordingly.

Section 4.—Mandamus to Municipal Corporations and Municipal Officers.

I. In general.

HOWE v. COMMISSIONERS OF CRAWFORD COUNTY.

1864. SUPREME COURT OF PENNSYLVANIA. 47 Pa. St. 361.

THIS was an application by O. Kendall Howe, Burgess of Titusville, for an order in the nature of a mandamus, to compel the commissioners of Crawford County to repair or rebuild a bridge over Oil Creek, at Titusville, in said county.

The bridge had been built by the county in 1820 by direction of the Quarter Sessions, under and by virtue of the Act of 1802, and had been repaired from time to time at the expense of the county, but at the time of this application the superstructure had by age and neglect become impassable, or nearly so.

The refusal of the commissioners to rebuild the bridge was based on their construction of an Act of Assembly, approved March 11, 1844, by which an Act approved April 13, 1843, which imposed on counties the duty of keeping county bridges that had been built

under the Act of 1836 in repair, had been repealed; and because also the bridge was not within the corporate limits of the borough of Titusville.

The court below refused to award the order prayed for, which was the error assigned.

The opinion of the court was delivered by

WOODWARD, C. J.—County bridges under our General Road Law of June 13, 1836, are such as are established agreeably to the provisions of the 35th section of that enactment, and it is only to such bridges that the remedial provisions of the subsequent sections apply. The Oil Creek Bridge, in question here, is not such a bridge, because it was built long before the Act of 1836, but it was nevertheless a county bridge under the prior Acts of the Assembly, and by virtue of the very regular proceedings had in the Quarter Sessions of Crawford county in 1820. Built originally by the county under legal authority, and repeatedly repaired by the commissioners without the stimulus of a judicial mandamus, how has it ceased to be a county bridge? How has the obligation to maintain it been taken off the shoulders of the commissioners?

It is said the Act of April 13, 1843, which charged counties with the duty of repairing county bridges built under the Act of 1836, was repealed as to Crawford county by the Act of the 11th of March, 1844; and so it was, but what had this legislation to do with a county bridge that was not built under the Act of 1836, but under that of 1802? We do not think that the rebuilding of the bridge in 1846 was an unauthorized act on the part of the commissioners, but a proper duty, which if they had not done it voluntarily, the court would have compelled them to perform. The duty was imposed by the judicial proceedings of 1820, and it was a continuing duty which the repeal of the Act of 1843 in nowise affected.

And nothing has since occurred, neither legislation nor judicial action, to take away the county character of this bridge. The incorporation of the borough of Titusville did not relieve the county of the obligation to maintain it, much less its natural decay or accident by flood or fire. On the contrary, the Act of the 25th of March, 1861, P. L. 206, was declaratory of the duty of the commissioners "to repair all accidental damages to the county bridges of said county (of Crawford) which may have been or shall hereafter be caused by the violence of fires, floods, winds, or otherwise, and to repair the same when impassable or dangerous from decay."

If we should construe the word "repair" in this act as strictly as the court below did, nay, if we should set aside the act altogether, the duty of maintaining the bridge, once legally imposed upon the county and never taken off, will still have to be enforced. But we cannot so read the act as to exclude the restoration of a broken superstructure. What but a "repair" of a bridge is the

renewal of the superstructure? The principal cost of most bridges is in the piers and abutments. These we understand, are unimpaired in the bridge in question, but the superstructure broke down from age and decay, and the commissioners doubt whether an Act of Assembly is applicable which enjoins them to repair all county bridges when "dangerous or impassable from decay." If we comprehend the case, this bridge is impassable from decay, and so is within the very words of the act. We cannot graduate repairs, and say slight ones may be done, and large ones neglected. The legislature did not mean we should do this. They meant by repairs whatever was necessary to make bridges safe and passable, and generally those repairs that are the most thorough are in the end the cheapest.

Such is our construction of the Act of 1861, and of the duties of the commissioners, both under the act and without it. Mandamus is the spur by which the law moves them to their duty, and though the proceedings in this case were not very formal, they are not excepted to on this ground, and we will reverse the judgment below, and remand the record with directions to award a peremptory mandamus.

AGNEW, J., was absent at *Nisi Prius* when this case was argued.

See also, *Pfister v. Bd. of Commissioners*, 82 Ind. 382; *Albin v. Board of Directors*, 58 Iowa, 77; *Hall v. Selectmen*, 39 N. H. 511; *People v. Common Council of N. Y.*, 45 Barb. (N. Y.) 473; *People v. Green*, 64 N. Y. 499; *State v. Porter*, 134 Ind. 63; *Henry v. Taylor*, 57 Iowa, 72; *Humboldt Co. v. Churchill Co.*, 6 Nev. 30; *People v. Supervisors*, 56 N. Y. 249; *Nye v. Rose*, 17 R. I. 733.

But see *People v. Whipple*, 41 Mich. 548.

2. To compel auditing and payment of claims.

(See *Raish v. Board of Education*, 81 Cal. 542, *Supra*, p. 54.)

HALL v. SELECTMEN OF SOMERSWORTH.

1859. SUPREME JUDICIAL COURT OF NEW HAMPSHIRE.
39 N. H. 511.

PETITION for a mandamus, filed by the school commissioner for the county of Strafford for the year commencing June 23, 1859, to compel the selectmen of Somersworth, in that county, to pay over to the commissioner the sum of sixty-five dollars and eight cents, being a sum equal to two per cent. of the amount required by law to be raised for the support of common schools in said town of Somersworth.

BELLOWS, J.—All the facts alleged in the petition in this case, independent of legal conclusions, were admitted by the respondents, and the objections to granting a mandamus urged at the hearing were, mainly, that there was no duty of an imperative character upon either the town or the selectmen to make the appropriation, but that the whole matter was discretionary, inasmuch as the teachers' institutes were voluntary associations; that the selectmen had no authority to assess such a tax without the vote of the town, and that there was no law compelling the selectmen to pay the money to the commissioner.

Upon a careful examination of the various statutes upon this subject, we are all of the opinion, that the duty of the town to appropriate and pay over the two per cent. for the support of the teachers' institutes is imperative.

The obligation of the town, then, to pay their money is like other pecuniary obligations, such as to pay its debts and to support the poor within its limits, and may be enforced by appropriate remedies. If it be regarded as a provision for the support of schools, and as coming under the general denomination of school taxes, then, as the amount is fixed or can be determined by computation, the selectmen would be authorized by ch. 43 of the Rev. Stat. § 3, to assess the same. If not so regarded, it would fall within the general idea of town charges, and would be provided for out of the money raised for such purpose, as town taxes; and a separate assessment would not be necessary any more than in the case of money for the support of the poor. *Tucker v. Aiken*, 7 N. H. 126, 127. In either event it would be the duty of the selectmen, who have the management of all the prudential affairs of the town, to provide for and pay over seasonably the required sum. It stands upon the footing of a debt or an obligation, resting upon the town, which ought to be discharged in season, to promote the objects designed by the law, and the selectmen would clearly be justified in paying the amount to the school commissioner, to be appropriated by him for the support of the yearly teachers' institutes. This view we think is well sustained by adjudged cases. *Sanborn v. Deerfield*, 2 N. H. 251; *Horn v. Whittier* 6 N. H. 88; *Andover v. Grafton*, 7 N. H. 298; *Pike v. Middleton*, 12 N. H. 278.

The remaining question is, whether this is a proper case for the exercise of the power to grant the writ of mandamus.

The supreme court has power to issue writs of mandamus, prohibition, and *quo warranto*, and all other writs and processes, to courts of inferior jurisdiction, to corporations and individuals, for the furtherance of justice and the due administration of the laws. Rev. Stat. ch. § 3. In what cases the writ shall issue, is to be determined by the course and usages of the courts in England and this country at common law. In England it is a prerogative writ,

to the aid of which the citizen is entitled upon a proper case, previously shown to the satisfaction of the court. It was introduced to prevent disorder from a failure of justice and a defect of police. It ought to be used upon all occasions where the law has established no specific remedy, and when, in justice and good government there ought to be one. Lord Mansfield in *Rex v. Barker*, 3 Burr. (K. B.) 1267. It is directed to some person, corporation, or inferior court, requiring them to do some particular thing, therein specified, which appertains to their office or duty, and is supposed to be consonant to right and justice. *Kendall v. United States*, 11 How. (U. S.) 524, 614. In *Rex v. Buxton* 3 T. R. (K. B.) 592, a mandamus was issued to compel the defendant to pay over to one Atherton the weekly sum £6, 6s. 2d, which the overseers of the poor had contracted to pay him for the support of the poor of the parish; it being admitted that the defendant had the money, to be applied for the relief of the poor, and had refused to apply the sum for this purpose. And in *Rex v. St. Catherine's Dock*, 4 B. & Ad. (K. B.) 360, a mandamus was granted to compel the treasurer to pay a sum of money awarded to be due from the company, when the charter did not authorize execution to issue against the effects of individual members and goods of the company. See also, 6 Bing. (C. P.) 688. In every well constituted government the highest judicial authority must necessarily have a supervisory power over all inferior tribunals, magistrates and all others exercising public authority. In the exercise of this power the writ of mandamus may be used, not however as a matter of right, but granted at the discretion of the court, and with much caution, and where there is no other adequate and specific remedy. *Strong, petitioner*, 20 Pick. (Mass.) 484, 495, 497. In *Kendall v. United States*, 12 Pet. (U. S.) 524, it was held that a mandamus lies to compel the Postmaster General to credit the relator with a certain sum which was ascertained and settled to be due. In *Commonwealth v. Hampden*, 2 Pick. (Mass.) 414, it was held that under a provision that the court of general sessions should build or provide, at the charge of the county, a house of correction, the duty was peremptory and the mandamus should issue. In *Carpenter v. Commissioners of Bristol County*, 21 Pick. (Mass.) 258, it was held that the writ lies to all inferior tribunals, magistrates and officers, and extends to all cases of neglect to perform a legal duty where there is no other adequate remedy. Where, in laying out a highway, the damages to a land owner were duly assessed and certified to the commissioners, who declined to give an order on the county treasurer for the reason that the road was afterwards discontinued, *SHAW, C. J.*, held that it was a proper case for a mandamus to compel the commissioners to draw the order. *Harrington v. County Commissioners*, 22 Pick. (Mass.) 263. So a mandamus was issued to require county courts to assess dam-

ages for injury to the petitioner's land by a road located so near as to injure his buildings by blasting. *Dodge v. Essex County*, 3 Metc. (Mass.) 380. So a mandamus will lie to compel a county treasurer to pay a sheriff for his services in attending court, the account having been allowed by the presiding judge (*Baker v. Johnson*, 41 Me. 15, and many cases cited); to compel a county treasurer to pay a demand legally allowed for the supervisors, *People v. Edmunds*, 19 Barb. (N. Y.) 468; to compel a school district from which another has been taken, to pay over the proportional amount of the value of the school-house retained by the old district, *District No. 2 v. District No. 1*, 3 Wis. 333. See also, *Kimball v. Lamprey*, 91 N. H. 215; *Butler v. Selectmen of Pelham*, 19 N. H. 553; *Ballou v. Smith*, 29 N. H. 530.

We also think that the case before us comes within the principles established for the exercise of this power. The respondents are public officers, the duty in question is of a public nature, and the money, when paid over, is to be applied to a public object. It concerns the due administration of the laws that a duty like this should be promptly performed; and unless some other adequate and specific remedy exists, the court would not hesitate to resort to the summary proceeding of a writ of mandamus. If the selectmen were liable to indictment, as in case of neglect to provide for the poor, it could not be said to be an adequate and a specific remedy, inasmuch as it would place no money in the hands of the commissioner; nor can the court see any other remedy that can be regarded as adequate and specific, and at the same time free from serious doubt. No right of action is given to any one by the statute against the selectmen, or the town, to recover this money, and it is, to say the least, doubtful whether, without some such provision, any action could be maintained. Under such circumstances it has been held that a mandamus may properly be granted. *Baker v. Johnson*, 41 Me. 24; *Harrington v. Berkshire Co.*, 22 Pick. (Mass.) 268; *Kendall v. United States*, 12 Pet. (U. S.) 524, 614. In *Kimball v. Lamprey*, 19 N. H. 210, a mandamus issued to compel the old board of selectmen to deliver up books to the new board.

We hold, then, that the duty is clear and specific, and that there is no other adequate remedy; and we hold, also, that the money ought to be paid over to the school commissioner. By the law of July 12, 1850, ch. 955, it is provided that it shall be the duty of each county school commissioner to take charge of the teachers' institutes that may be held in his county. This law provides for the appointments of county school commissioners, and defines their duties. The commissioner, then, is the proper person to act as the relator in a case of this sort, he alone being designated to appropriate the money when received.

In this case, there having been notice of the petition, and a

hearing of the parties before us, and no suggestion of any other objection than those already disposed of, there must be granted, in accordance with the views here stated, a peremptory mandamus.

See also, *State v. Ames*, 31 Minn. 440; *Mau v. Liddle*, 15 Nev. 271; *State v. Born*, 97 Wis. 542; *Brem v. Ark. Co. Ct.*, 9 Ark. 240; *Howell v. Cooper*, 2 Colo. App. 530; *Henderson v. State*, 53 Ind. 60; *Hickey v. Oakland County Supervisors*, 62 Mich. 94; *State v. McCardy*, 62 Minn. 509; *State v. Smith*, 15 Mo. App. 412; *State v. Slocum*, 34 Neb. 368; *People v. City of New York*, 23 N. Y. S. 1060.

In all cases, however, where discretion is vested in the officer or board, Mandamus will be refused. So also where another specific remedy is provided by statute.

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3. To compel municipal taxation to pay debts, subscriptions and bonds.

UNITED STATES v. NEW ORLEANS.

1878. SUPREME COURT OF THE UNITED STATES.
98 U. S. 381.

THIS was a petition presented in April, 1876, by Morris Ranger, the relator, for a writ of mandamus to compel the City of New Orleans to pay three judgments. The petition alleges that he had recovered them in the circuit court of the United States for an amount exceeding in the aggregate \$59,000, against the city, on its bonds and coupons issued under the provisions of acts of the legislature of Louisiana, passed on the 15th of March, 1854, and designated as Nos. 108 and 109; that executions had been issued upon the judgments and returned unsatisfied; that there was no property belonging to the city subject to seizure thereon.

It also alleges that in June, 1870, the city had sold eighty thousand shares of stock of the New Orleans, Jackson, and Great Northern Railroad Company, which it held, for the sum of \$320,000, and that by the act No. 109, of 1854, these shares were forever pledged for the payment of the bonds issued under its provisions; that the city should therefore be compelled to pay out of their proceeds so much of the judgments as appears on the face of the records to have been rendered on the bonds; or, in case their payment cannot be enforced in this way, that it should be compelled to levy and collect a tax for that purpose, and also a tax to pay so much of the judgments as was rendered upon bonds and coupons issued under the act, No. 108, of 1854; but that the mayor and administrators, who represent and exercise the powers of the city, refuse to pay the judgments out of any funds in their possession or under their control, or to levy a tax for their payment. The relator therefore prays the court to order them to show cause why

a writ of mandamus should not be issued compelling them to apply the proceeds and to levy a tax as mentioned.

The order to show cause was accordingly issued; and the city authorities appeared and filed answer to the petition, in which they admitted the recovery of the judgment by the relator,—speaking of the three judgments as one,—the issue of executions thereon, and their return unsatisfied, the sale of the eighty thousand shares of the capital stock of the New Orleans, Jackson, and Great Northern Railroad Company for \$320,000, and the receipt of the money by their predecessors, and set up as a defense to the prayer of the petition that the judgment was recovered upon certain bonds issued to that company by the city under the act of March 15, 1854, No. 109, making no mention of the act No. 108; that no tax for the payment of the principal of the bonds is directed to be levied by that act or any other act of the legislature; that, as respects the interest on the bonds, provision is made for its payment out of the back taxes due the city, and inserted in its budget for 1876; and that the proceeds arising from the sale of the stock of the railroad company are not in the treasury of the city or under their control, having been used and expended by their predecessors. They therefore prayed that the petition be dismissed.

The relator demurred to this answer. The court overruled the demurrer and refused the writ; and from its judgment the case is brought to this court.

MR. JUSTICE FIELD, after stating the case, delivered the opinion of the court.

The judge of the circuit court accompanied the judgment with an opinion giving the reasons of his decision, which were substantially those stated in the answer of the city; that the statute authorizing the issue of the bonds, upon which the judgments were recovered, made no provision for levying a tax to pay the principal, but intended that it should be paid out of the stock of the railroad company and its revenues; and that the proceeds from the sale of the stock had been already expended by the predecessors of the present city authorities. The court, adopting the view of the city authorities as to the construction of the statute, and the supposed intention of the legislature, proceeded on the principle that the power of taxation belongs exclusively to the legislative branch of the government, and that the judiciary cannot direct a tax to be levied when none is authorized by the legislature; and that the issuing of a mandamus to apply the proceeds received from the sale of the stock would be a futile proceeding, they having been previously used for other purposes. A writ, said the court, could not issue commanding the performance of an admitted impossibility.

The position that the power of taxation belongs exclusively to the legislative branch of the government, no one will controvert.

Under our system it is lodged nowhere else. But it is a power that may be delegated by the legislature to municipal corporations, which are merely instrumentalities of the state for the better administration of the government in matters of local concern. When such a corporation is created, the power of taxation is vested in it as an essential attribute, for all the purposes of its existence, unless its exercise be in express terms prohibited. For the accomplishment of these purposes, its authorities, however limited the corporation, must have the power to raise money and control its expenditure. In a city, even of small extent, they have to provide for the preservation of the peace, good order, and health, and the execution of such measures as conduce to the general good of its citizens; such as the opening and repairing of streets, the construction of sidewalks, sewers, and drains, the introduction of water, and the establishment of a fire and police department. In a city like New Orleans, situated on a navigable stream, or on a harbor of a lake or sea, their powers are usually enlarged, so as to embrace the building of wharves and docks or levies for the benefit of commerce, and they may also extend to the construction of roads leading to it, or the contributing of aid toward their construction. The number and variety of works that may be authorized, having a regard to the general welfare of the city or of its people, and mere matters of legislative discretion. All of them require for their execution considerable expenditures of money. Their authorization without providing the means for such expenditures would be an idle and futile proceeding. Their authorization, therefore, implies and carries with it the power to adopt the ordinary means employed by such bodies to raise funds for their execution, unless such funds are otherwise provided. And the ordinary means in such cases is taxation. A municipality without the power of taxation would be a body without life, incapable of acting, and serving no useful purpose.

For the same reason, when the authority to borrow money or incur an obligation in order to execute a public work is conferred upon a municipal corporation, the power to levy a tax for its payment or the discharge of the obligation accompanies it; and this, too, without any special mention that such power is granted. This arises from the fact that such corporations seldom possess—so seldom, indeed, as to be exceptional—any means to discharge their pecuniary obligations except by taxation. *"It is therefore to be inferred,"* as observed by this court in *Loan Association v. Topeka*, 20 Wall. (U. S.) 660, *"that when the legislature of a state authorizes a county or a city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is the act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference."*

The doctrine here stated is asserted by the Supreme Court of Pennsylvania in *Commonwealth v. Commissioners of Allegheny County*, 37 Pa. 277. That county was authorized by an act of the legislature to subscribe to the capital stock of a railroad company, and to issue its bonds in payment therefor. The interest of them being unpaid, a writ of mandamus was applied for to compel the commissioners of the county to make provisions to pay it. The return of the officers set up, among other objections to the writ, that the act authorizing the subscription and issue of the bonds provided no means of payment, either of the principal or the interest. To this defense the court said: "The act of 1843 authorized subscriptions by certain counties to be made as 'fully as an individual could do', without prescribing more precisely the terms. But by the fifth section of the act of April 18, 1843, counties subscribing are authorized to borrow money to pay for such subscriptions. We have decided that bonds or certificates of loan issued by a municipal corporation is an ordinary and appropriate mode of borrowing money and the act of 1853 expressly authorized the issue of such securities. The subscriptions were accordingly made, and the bonds issued. Thus was a lawful debt incurred by the county; and as no other than the ordinary mode of extinguishing it, or of paying the interest thereon, was provided, it follows, of course, that the ordinary mode of raising the means must be resorted to; namely, to provide for it, in the annual assessment of taxes for county purposes." Again, in the same case, the court said: "In the next place, it is averred that there is no authority to levy a tax for the payment of the interest by the county. We have already treated of this, and said that the authority to create the debt implies an obligation to pay it; and when no special mode of doing so is provided, it is also to be implied that it is to be done in the ordinary way,—by the levy and collection of taxes."

In numerous cases, similar language is found in opinions of the state courts, not required, perhaps, to decide the point in judgment therein, but showing a recognition of the doctrine stated. Thus, in *Lowell v. Boston*, 111 Mass. 460, the Supreme Court of Massachusetts, in speaking of bonds which the legislature had authorized the city of Boston to issue, in order to raise funds to be loaned to individuals to aid them in rebuilding that portion of the city which was burned in the great fire of November, 1872, said: "The issue of bonds by the city, whatever provision may be made for their redemption, involves the possible and not improbable consequence of a necessity to provide for their payment by the city. The right to incur the obligation implies the right to raise money by taxation for payment of the bonds; or, what is equivalent, the right to levy a tax for the purposes for which the fund is to be raised by means of the bonds so authorized. To the same purport is the language of the Supreme Court of Wisconsin in *Hasbrouck v. Milwaukee*, 25

Wis. 122. And in the recent case of *Parsons v. City of Charleston*, in the United States Circuit Court, the chief justice gave emphatic affirmation to the doctrine. *Hughes*, 282. *Indeed, it is always to be assumed, in the absence of clear restrictive provisions, that when the legislature grants to a city the power to create a debt, it intends that the city shall pay it, and that the payment shall not be left to its caprice or pleasure. When, therefore, the power to contract a debt is conferred, it must be held that a corresponding power of providing for its payment is also conferred. The latter is implied in the grant of the former, and such implication cannot be overcome except by express words excluding it.*

In the present case, the indebtedness of the city of New Orleans is conclusively established by the judgments recovered. The validity of the bonds upon which they were rendered is not now open to question. Nor is the payment of the judgments restricted to any species of property or revenues, or subject to any conditions. The indebtedness is absolute. If there were any question originally as to a limitation of the means by which the bonds were to be paid, it is cut off from consideration now by the judgments. If a limitation existed, it should have been insisted upon when the suits on the bonds were pending, and continued in the judgments. The fact that none is thus continued is conclusive on this application that none existed.

"Owing the debt, the city has the power to levy the tax for its payment. By its charter, in force when the bonds were issued, it was invested in express terms, 'with all the powers, rights, privileges, and immunities incident to a municipal corporation and necessary for the proper government of the same.'"

As already said, the power of taxation is a power incident to such a corporation, and may be exercised for all the purposes authorized by its charter or subsequent legislation. Whatever the legislature empowers the corporation to do is presumably for its benefit, and may, in "the proper government of the same," be done. Having the power to levy the tax for the payment of the judgments of the relator, it was the duty of the city, through its authorities, to exercise the power. The payment was not a matter resting in its pleasure, but a duty which it owed to the creditor. Having neglected this duty, the case was one in which a mandamus should have been issued to compel its performance. *Knox County v. Aspinwall*, 24 How. (U. S.) 376; *Von Hoffman v. City of Quincy*, 4 Wall. (U. S.) 535; *Benbow v. Iowa City*, 7 *id.* 313; *Supervisors v. Rogers*, *id.* 175; *Supervisors v. Durant*, 9 *id.* 415; *County of Cass v. Johnston*, 95 U. S. 360.

The judgment of the court below must, therefore be reversed, and the cause remanded with directions to issue the writ as prayed in the petition of the relator; and it is so ordered.

See also *Ralls Co. Ct. v. United States*, 105 U. S. 733; *Eufaula v. Hickman*, 57 Ala. 338; *Meyer v. Brown*, 65 Cal. 583; *People v. Getzendaner*, 137 Ill. 234; *Flagg v. City of Palmyra*, 33 Mo. 440; *Commonwealth v. Pittsburgh*, 34 Pa. 496; *State v. Beloit*, 20 Wis. 85.

The proper remedy to enforce the payment of a judgment against a municipal corporation is *Mandamus* to compel the levy of a tax to pay such judgment.

See *United States v. Lee Co.*, 2 Biss. (U. S.) 77; *Nelson v. St. Martin*, 111 U. S. 716; *State v. Hug*, 44 Mo. 116.

UNITED STATES EX REL. LEARNED v. BURLINGTON.

1863. UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF IOWA.
2 Am. Law Reg. (N. S.) 394, 24 Fed. Cas. 1302.

MILLER, Circuit Justice. The plaintiff, having recovered against the city of Burlington a judgment in the district court of the United States for the state of Iowa, and having issued execution which was returned *nulla bona*, applied to that court for a writ of *mandamus*, requiring the mayor and aldermen of said city to levy a special tax for the payment of said judgment. The cause being of that class which, by the act creating this court, is transferred into it, the application is now made here for the peremptory writ.

The defendants, who have been served with notice, make answer under oath, to the information, and set up, substantially the following reasons why the writ should not be granted: 1st. That the courts of the federal government have no jurisdiction to issue a writ of *mandamus* to persons whose functions are created by state law, such officers being responsible alone to state authority, so far as this writ is concerned. 2d. That there is nothing in the ordinance or contract, by which the debt was created, which requires that any specific tax shall be levied for the payment of this debt. 3d. That by the charter of the city of Burlington, no greater tax than one percent per annum can be levied on the taxable property of the city, and that the authorities have levied a tax of that amount for the present year.

The plaintiff objects, by way of demurrer, to the sufficiency of the matters thus set up in the answer, which may be treated as standing in the place of a return to an alternative writ.

1. If there were any doubt as to the power of the federal courts to use the writ of *mandamus* in cases of this character, the question is settled in favor of the existence of that power by the case of *Commissioners of Knox County v. Aspinwall*, 24 How. (U. S.) 376. The first objection is therefore untenable.

2. In reply to the second objection it is claimed by plaintiff that in the ordinance for borrowing money, under which the debt was contracted, on which the judgment was rendered, there is a provision

for levying a specific tax for the payment of the debt and interest. The language of the ordinance on this subject is as follows: "Be it further enacted, that it shall be the duty of the city council of said city to provide means to meet the payment of said bonds and coupons, when the same may become due, according to the contract entered into for said loan and to pay the same." Does this language imply an agreement to levy a special tax separate from other taxes or other resources of the city, for the payment of this debt? Or does it imply that out of the various resources of the city, its general annual tax, its wharfage, its licenses, or its power to borrow money, some means will be provided by the city authorities for that purpose? The latter seems to be the more reasonable construction of the ordinance. The plaintiff, however, urges that by §§ 1895-1897, Code (Revision 1860, § 3274 *et seq.*), it is made the duty of the mayor and aldermen of the city to levy a tax for the special purpose of paying this debt, and to see that it is collected and appropriated to that purpose, and that this duty should be enforced by mandamus. These sections do provide that in cases where a judgment has been recovered against a city or any other civil corporation, and no property is found on which to levy execution, that "a tax must be levied as early as practicable, sufficient to pay off the judgment with interest and costs." The case of *State v. Judge of Floyd Co.*, 5 Iowa 380, seems to intimate pretty strongly that in such a case if the tax was not levied, a sufficient remedy is provided by section 1897, in the personal responsibility of the officers who should refuse to make the levy. From the view taken of the present case by the court, it is not necessary to decide this point.

3. It is true, as claimed by the defendant, that the mayor and aldermen of Burlington have no legal authority to levy any tax on property liable to taxation, exceeding one percent per annum, and that they have levied a tax of that amount for the present year, it is clear that this court cannot compel them to levy an additional tax. The only statutory provisions on that point, brought to the attention of the court, or which it has been able to find, are the first section of the act of February 22d, 1847 (Laws 1846-1847, p. 91), to amend the charter of the city of Burlington, and the first section of the act of January 22d, 1853, to amend said charter. By the act first mentioned it is declared, "that the amount of tax to be levied upon real and personal estate by the mayor and aldermen of the city of Burlington, after the taking effect of this act, shall not exceed 12½ cents on every one hundred dollars' worth of property to be assessed." This is one-eighth of one percent. The act of 1853 says, "That to defray the current expenses of said city, the city council shall have power to levy and collect taxes on all the real and personal property in said city, not exempted by general laws from taxation; provided, that the amount of tax levied for said purpose shall not

in any year exceed one dollar on each one hundred dollars' worth of property taxed."

The result of these two sections considered alone would seem to be that except for the purpose of defraying the current expenses of the city, the tax cannot exceed one-eighth of one percent, and cannot, for any or all purposes, exceed one percent. Do the provisions of sections 1895, 1896, and 1897 of the Code repeal the above sections of the city charter, or do they override them when brought into question together, or is there any necessary conflict between them? There is certainly no express repeal, and the Code could not be intended by implication to repeal the section last quoted, for it was passed since the Code became the law of the land. The rule also is well understood, that a repeal by implication can only arise when that is the necessary inference from the impossibility that both of the acts, supposed to be in conflict, can stand. If either act is to override the other, or repeal the other, certainly the later expression of the legislative will must stand in preference to the former. But in the present case there is no such conflict. The provision of the Code can have its effect by compelling the city council to levy the tax so far as it has power to levy it. The provisions of the charter can stand as they were intended, as a useful and just limitation of that power. The previous year to this the city council of Burlington, as appears by the answer in the case, only levied a tax of one-half percent. Undoubtedly if this was found to be inadequate to meet the current expenses, and to provide a fund to meet the judgment, it was the duty of the council under section 1897 of the Code, to so increase the tax, inside of one percent, as to raise that fund if it could be so done. This they aver they have now done, to the full extent of their authority, and this court will not order them to exceed it. That this is a sound view of the intention of the framers of the Code is to be strongly inferred, from some of the provisions on the subject of town and city corporations. Chapter 42 is devoted to providing the manner in which the citizens of a village or a town may organize themselves into a corporation, and may either assume the privileges and responsibilities of towns or cities according to the number of their population. In speaking of a town charter thus adopted, it says, § 665, that it may give powers to establish by-laws, ordinances, etc., and "to levy and collect taxes on all property within the limits of such corporation which by the laws of the state is not exempt, for all purposes, from taxation, which tax must not exceed one percent per annum on the assessed value thereof," and section 669 says that "the preceding sections are applicable to a town desiring to become organized as a city." Now these are the very corporations mentioned in sections 1895 to 1897 inclusive, of which it is said that a tax must be levied to pay a judgment recovered against them. Was it meant that they should absolutely, at once, levy a tax

sufficient to pay the debt without regard to the one percent limitation in the previous sections? Or was it meant that they should use such taxing power as they had for that purpose, and no more? If the former is the sound construction, then the limit upon the taxing power is nugatory, and it makes no difference how strongly the legislature, or the charter adopted by the people, may forbid excessive taxation, the authorities of the city may, by resorting to the powers to make contracts, impose upon the property-holders a tax unlimited in amount or duration. The wisdom of that provision in the Code, and in the charter of the city of Burlington, has been amply vindicated by events occurring since their enactment, and they should not lightly be set aside.

As it appears then to the court that the city authorities have already levied for the present year, a tax as large as the law permits, no writ of mandamus can rightfully issue to compel them to levy more. The demurrer of plaintiff being to the whole answer, is overruled, and the application for a writ of mandamus is refused.

The above case was reversed in the 154 U. S. 568 (4 Sup. Ct. 1215). See preceding case, *United States v. Muscatine*, 19 Sup. Ct., and especially the vigorous dissenting opinion of Justice Miller therein.

The weight of authority today holds that Mandamus will not lie to compel the levy of taxes above the amount or the rate limited by the legislature. *United States v. Macon Co. Ct.*, 99 U. S. 582; *In re M. E. Church*, 66 N. Y. 395; *Young v. Lane*, 43 Neb. 813.

In the Federal Courts Mandamus will not issue until after a valid judgment for the debt. *Heine v. Levee Commissioners*, 19 Wall. (U. S.) 655.

4. To compel the making of public improvements.

RICHARDS ET AL. V. COUNTY COMMISSIONERS OF BRISTOL.

1876. SUPREME JUDICIAL COURT OF MASSACHUSETTS.
120 Mass. 401.

COLT, J. The petitioners ask for a writ of mandamus, requiring the county commissioners to construct and complete parts of Main Street and Elm Street in the town of Attleborough, which the petition states they had widened, straightened and located anew, but which the town had refused to make and complete under the commissioners' orders.

The answer, signed by the commissioners, admits the facts stated in the petition; but denies that the roads in question were highways or county roads at the time of the order, averring that Elm Street

was a town way; and, as to Main Street, referring to the case of *Hayden v. Attleborough*, 7 Gray (Mass.) 338, for the facts connected with its origin and history. Main Street appears from the report in that case to have been originally a part of the Norfolk and Bristol Turnpike, which the towns were authorized, upon the surrender of the charter of that corporation, to lay out as a common highway, provided the county did not. The town of Attleborough voted to accept the turnpike as a highway, and authorized its selectmen to lay it out. It was so laid out, and a record of it made by the selectmen. The Stat. of 1843, c. 54, under which this was done, thus gave to the towns the power to change the highway from a turnpike to a county road. The road was located originally through several towns in adjoining counties, and, from the time of the surrender of its charter by the turnpike corporation, to the filing of this answer in September, 1875, it was continued to be used as a highway for public travel.

It seems to be assumed, in the discussion in *Hayden v. Attleborough*, *ubi supra*, that the action of the town was not legally effectual to continue the road as a public highway. But whether it was or not, it is plain that there is nothing to control the presumption, which now arises from the facts disclosed, that at the time of its relocation the street has become a public highway by prescription. It is not the case of a road opened and dedicated to the public use by the owner, to which the provisions of the statute of 1846, c. 203; Gen. Stat., c. 43, § 82; are applicable. It was rather a continuance of the road as a highway by the compliance, or at least an attempted compliance, with the peculiar provisions of a special statute; and this, if followed by actual, general uninterrupted public use for the time stated, is enough to establish a highway. *Jennings v. Tisbury*, 5 Gray (Mass.) 73.

Under our statutes, the commissioners are authorized to locate anew any road laid out by the authority of a town or otherwise, either for the purpose of establishing the boundaries, or of making alterations in the course or the width of the same, and they may assess the expense upon the petitioners, or upon the town or the county. Gen. Stat., c. 43, § 12. They have power to change the grade of the road, and to order the construction rendered necessary by the alterations ordered in its course and width. *Hyde Park v. County Commissioners*, 117 Mass. 416. And, after a highway has thus been established and its construction ordered by them, if a town, whose duty it is to make such highway or a part thereof, shall fail to make it within the time prescribed, the commissioners are required to complete it as soon as may be thereafter. A public duty is thus imposed upon them for public reasons, in the exercise of which there is no discretion left to them. The action of the commissioners in the relocation of these streets, and in the improvements ordered,

is not open to legal objection; and it is their duty now to complete the construction ordered.

Mandamus to issue accordingly.

See also, *People v. Supervisors of San Francisco*, 36 Cal. 595; *People v. Common Council of Brooklyn*, 22 Barb. (N. Y.) 404; *Commissioners v. Commonwealth*, 72 Pa. St. 24; *Brokaw v. Commissioners*, 130 Ill. 482. See *contra*, *Reading v. Commonwealth*, 11 Pa. St. 196.

Section 5.—Mandamus to Private Corporations.

1. To compel the performance of duties due to the public, and to third parties.

—See *Mobile, etc., R. Co. v. Wisdom*, 5 Heisk. (Tenn.) 125. *Supra*, p. 20.

PEOPLE v. NEW YORK CENTRAL, ETC., R. CO.

1883 SUPREME COURT OF THE STATE OF NEW YORK.
28 Hun. (N. Y.) 543.

(APPEAL from orders granting motion to quash, and denying application by the attorney general for a peremptory writ of mandamus, commanding the railroad company to forthwith operate their road, and receive and transport freight as usual. The company's excuse for not doing so since June, 1882, was a strike of its employees for higher wages not alleged to be accompanied by violence, riot or other unlawful interference.)

DAVIS, P. J. The question presented by the motion is one of signal importance. It is whether the people of the state can invoke the power of the courts to compel the exercise by railroad corporations of the most useful public functions with which they are clothed. If the people have that right, there can be no doubt that their attorney general is the proper officer to set it in effective operation in their behalf. 1 Rev. Stat. 179, § 1; Code of Civil Procedure, § 1993; *People v. Halsey*, 37 N. Y. 344; *People v. Collins*, 19 Wend. (N. Y.) 56.

The question involves a consideration of the nature of this class of corporations, the objects for which they are created, the powers conferred and the duties imposed upon them by the laws of their creation and by the state. As bodies corporate, their ownership may be and usually is altogether private, belonging wholly to the holders of their capital stock; and their management may be vested in such

officers or agents as the stockholders and directors under the provisions of law may appoint. In this sense, they are to be regarded as trading or private corporations, having in view the profit or advantages of the corporators. But these conditions are in no just sense in conflict with their obligations and duties to the public. The objects of their creation are from their very nature largely different from ordinary private and trading corporations. *Railroads are, in every essential quality, public highways, created for public use, but permitted to be owned, controlled, and managed by private persons.* But for this quality the railroads of the respondents could not exist lawfully. Their construction depended upon the exercise of the right of eminent domain, which belongs to the state in its corporate capacity alone, and cannot be conferred except upon a "public use." The state has no power to grant the right of eminent domain to any corporation or person for any other than a public use. Every attempt to go beyond that is void by the constitution; and although the legislature may determine what is a necessary public use, it cannot by any sort of enactment divest of that character any portion of the right of eminent domain which it may confer. This characteristic of public use is in no sense lost or diminished by the fact that the use of the railroad by the corporation which constructs or owns it must from its nature be exclusive. That incident grows out of the method of use which does not admit of any enjoyment in common by the public. The general and popular use of a railroad as a highway is, therefore, handed over exclusively to corporate management and control, because that is for the best and manifest advantage of the public.

In *Olcott v. Supervisors*, 16 Wall. (U. S.) 678, 694, the Supreme Court of the United States adjudge:

"Whether the use of a railroad is a public or a private one, depends in no measure upon the question who constructed it or who owns it. It has never been considered a matter of any importance that the road was built by the agency of a private corporation. No matter who is the agent, the function performed is that of the state. Though the ownership is private, the use is public. The owners may be private companies, but they are compellable to permit the public to use their works in the manner in which such works can be used. That all persons may not put their own cars upon the road, and use their own motive power, has no bearing upon the question whether the road is a public highway. It bears only upon the mode of use, of which the legislature is the exclusive judge."

The maintenance and control of most other classes of public highways are so devolved (upon public officers), and the performance of every official duty in respect of them may be compelled by the courts, on application of the state, while private damages may also be recoverable for individual injuries. The analogy between

such officials and railroad corporations in regard to their relation to the state, is strong and clear, and so far as it affects the construction and proper and efficient maintenance of their railways will be questioned by no one. It is equally clear, we think, in regard to their duties as carriers of persons and property. This springs sharply out of the exclusive nature of their right to do these things. On other public highways every person may be his own carrier; or he may hire whomsoever he will to do that service. Between him and such employee a special and personal relation exists, independent of any public duty, and in which the state has no interest. In such a case, the carrier has not contracted with the state to assume the duty as a public trust, nor taken the right and power to do it from the state by becoming the special donee and depository of a trust. A good reason may, therefore, be assigned why the state will not by mandamus enforce the performance of his contract by such a carrier. But the reason for such a rule altogether fails when the public highway is the exclusive property of a body corporate, which alone has power to use it, in a manner which of necessity requires that all management, control, and user for the purposes of carriage must be limited to itself, and which, as a condition of the franchise that grants absolute and exclusive power over and user of a public highway, has contracted with the state to accept the duty of carrying all persons and property within the scope of its charter, as a public trust.

The relation of the state to such a body is entirely different from that which it bears to the individual users of a common highway, as between whom and the state no relation of trust exists; and there is small reason for seeking analogies between them. It is the duty of the state to make and maintain public highways. That duty it performs by a scheme of laws, which set into operation the functions of its political divisions into counties, towns, and other municipalities, and their officers. It can and does enforce those duties when necessary through the courts. It is not the duty of the state to be or become a common carrier upon its public highways; but it may, in some cases, assume that duty, and whenever it lawfully does so, the execution of that duty may be enforced against the agents or officers upon whom the law devolves it. It may grant its power to construct a public highway to a corporation or an individual and with that power the right of eminent domain in order to secure the public use; and may make the traffic of the highway common to all on such terms as it may impose. In such case it is its duty to secure that common traffic, when refused, by the authority of its courts. *People v. Collins*, 19 Wend. (N. Y.) 56; *People v. Commissioners of Salem*, 1 Cow. (N. Y.) 23. Or it may grant the same powers of construction or maintenance with the exclusive enjoyment of use which the manner of use requires, and if that excludes all common

travel and transportation it may impose on the corporation or person the duty to furnish every requisite facility for carrying passengers and freight, and to carry both in such manner and at such times as public needs may require. Why is that duty, in respect of the power to compel its performance through the courts, not in the category of all others intrusted to such a body? The writ of mandamus has been awarded to compel a company to operate its roads as one continuous line, *Union Pacific R. Co. v. Hall*, 91 U. S. 343; to compel the running of the passenger trains to the terminus of the road, *State v. Hartford, etc., R. Co.*, 29 Conn. 538; to compel the company to make cattle guards and fences, *People ex rel. Garbutt v. Rochester State Line R. Co.*, 76 N. Y. 294; to compel it to build a bridge, *People ex rel. Kimball v. Boston, etc., R. Co.*, 70 N. Y. 569; to compel it to construct its road across streams, so as not to interfere with navigation, *State v. N. E. R. Co.*, 9 Rich. (S. Car.) 247; to compel it to run daily trains, *In re New Brunswick, etc., R. R.*, 1 P. & B. 667; to compel the delivery of grain at a particular elevator, *Chicago, etc., R. Co. v. People*, 56 Ill. 365; to compel the completion of its road, *Farmers' Loan & Trust Co. v. Henning*, 17 Am. Law Reg. (N. S.) 266; to compel the grading of its track so as to make crossings convenient and useful, *People ex rel. Green v. D. & C. R. Co.*, 58 N. Y. 152; *New York Central, etc., R. Co. v. People*, 12 Hun. (N. Y.) 195, s. c. 74 N. Y. 302; *Indianapolis R. Co. v. State*, 37 Ind. 489; to compel the reestablishment of an abandoned station, *State v. Railroad Co.*, 37 Conn. 154; to compel the replacement of a track taken up in violation of its charter, *Rex v. Severn, etc., R. Co.*, 2 Barn. & Ald. (K. B.) 646; to prevent the abandonment of a road once completed, *Talcott v. Pine Grove, supra*, 1 Flip-pin (U. S. Cir.) 145; and to compel a company to exercise its franchise, *People v. A. & V. R. Co.*, 24 N. Y. 261. These are all express or implied obligations arising from the charters of the railroad companies, but not more so than the duty to carry freight and passengers. That duty is, indeed, the *ultima ratio* of their existence; the great and sole public good for the attainment and accomplishment of which all the other powers are given or imposed. It is strangely illogical to assert that the state, through the courts, may compel the performance of every step necessary to bring a corporation into a condition of readiness to do the very thing for which it is created, but is then powerless to compel the doing of the thing itself.

We cannot bring our minds to entertain a doubt that a railroad corporation is compellable by mandamus to exercise its duties as a carrier of freight and passengers; and that the power so to compel it rests equally firmly on the ground that that duty is a public trust, which, having been conferred by the state and accepted by the corporation, may be enforced for the public benefit; and also upon the contract between the corporation and the state, expressed in its char-

ter or implied in the acceptance of the franchise, *Abbott v. Johnstown R. Co.*, 80 N. Y. 31; and also upon the ground that the common right of all the people to travel and carry upon every public highway of the state has been changed in the special instance, by the legislature for adequate reasons, into a corporate franchise, to be exercised solely by a corporate body for the public benefit, to the exclusion of all other persons, whereby it has become the duty of the state to see to it that the franchise so put in trust may be faithfully administered by the trustee.

But it is said that the state is not injured and has no interest in the question whether the corporation perform the duty or not. The state may suffer no direct pecuniary injury, as it may not by the neglect of one or more of its numerous political officers who hold in trust for the people the official duties reposed in their hands; but that is no test of the power or duty of the state in either case. *The sovereignty of the state is injured whenever any public function vested by it in any person, natural or artificial, for the common good is not used or is misused, or is abused; and it is not bound to inquire whether some one or more of its citizens has not thereby received a special injury for which he may recover damages in his private suit. Such an injury wounds the sovereignty of the state and thereby, in a legal sense, injures the entire body politic.* The state, in such a case as this, has no other adequate remedy. It may proceed, it is true, to annul the corporation, as has been held in many cases where corporations had neglected public duties. *People v. Fishkill, etc., R. Co.*, 27 Barb. (N. Y.) 452, 458; *People v. Turnpike Co.*, 23 Wend. (N. Y.) 254; *Turnpike Co. v. State*, 3 Wall. (U. S.) 210; *People v. Turnpike Co.*, 23 Wend. (N. Y.) 208; *People v. Turnpike Co.*, 23 Wend. (N. Y.) 222; *Charles River Bridge Co. v. Warren Bridge*, 7 Pick. (Mass.) 344. But that remedy is not adequate, for it only destroys functions where the public interests require their continued existence and enforcement. It has, therefore, an election which of these remedies to pursue. *State v. Hartford, etc., R. Co.*, 29 Conn. 538; *People v. A. & V. R. Co.*, 24 N. Y. 261; *Talcott v. Pine Grove, supra*.

Nor do we think the fact that injured individuals may have private remedies for their damages they have sustained by neglect of duties precludes the state from its remedy by mandamus. Where the injury is to a single person under circumstances which do not affect the general public the courts, in the exercise of their discretion, have properly refused this remedy, on his relation. The injured party is then the suitor; he has an adequate remedy by a private action for damages. That was the case of the *People v. Erie R. Co.*, 22 Hun. (N. Y.) 533, relied upon by the court below, in which the court held that the relator's remedy was by suit for damages and not by mandamus. That case is not authority for denying the writ to the attor-

ney general for a neglect or a refusal by corporations to exercise their franchises to an extent which affects a great number of citizens, and continues for a considerable period of time; nor does it deny the right of the people acting on their own behalf and in their own suit to pursue this remedy in any case of neglect or refusal to exercise a public function which the interest of the people requires should be kept in vigorous and efficient use.

The court, in that case, recognizes the distinction when it says "an exception exists, where a corporation suspends the exercise of its franchises." The suspension of the exercise of corporate functions is the gravamen of the complaint in this case, and the case cited is no authority for denying the writ when the people come into court with their own suit by their attorney general to move for a writ of mandamus on allegations of an alleged long-continued and very general suspension of a corporate duty.

Having determined the question of the right of the state to prosecute the writ of mandamus on the ground of the refusal or the neglect of a corporation to exercise its duty of carrier, it remains to be seen whether a case which would justify the granting of the writ was presented. The case stands altogether on the facts presented by the appellants. The course taken by the respondents must be taken as an admission of the material facts contained in the petition and the affidavits.

The excuse appears only in the statement of the reasons assigned by the respondents for their refusal to accept, transport, and deliver the freight and the property. In the petition it is stated in these words, "that the persons in their employ handling such freight refuse to perform their work unless some small advance, said to be three cents per hour, is paid them by the said railroad corporation." The affidavits show, it may in short be said, that the skilled freight handlers of the respondents, who had been working at the rate of seventeen cents per hour (or one dollar and seventy cents for ten hours), refused to work unless twenty cents per hour, or two dollars per day of ten hours, were paid, and that their abandonment of their work, and the inefficiency of the unskilled men afterwards employed, caused the neglect and the refusal complained of.

These facts reduce the question to this: Can railroad corporations refuse or neglect to perform their public duties upon a controversy with their employes over the cost or the expense of doing them? We think this question admits of but one answer. The excuse has in the law no validity. *The duties imposed must be discharged at whatever cost. They cannot be laid down or abandoned or suspended without the legally expressed consent of the state.* The trusts are active, potential and imperative, and must be executed until lawfully surrendered, otherwise a public highway of great utility is closed or obstructed without any process recognized by law.

This is something no public officer charged with the same trusts and duties in regard to other public highways can do without subjecting himself to mandamus or indictment.

Reversed.

RICHMOND RAILWAY & ELECTRIC CO. v. BROWN.

1899. SUPREME COURT OF APPEALS OF VIRGINIA.

97 Va. 26, 32 S. E. 775.

(ERROR to judgment of the circuit court awarding a mandamus, upon the complaint of Brown stating that he was not accorded the rights of a passenger in being transferred from one part of the railway to another without paying an extra fare, as required by the provisions of the agreement with the county court, under legislative authority, permitting an extension of the line, and its operation, in the territory where the controversy arose. A demurrer to the petition was filed, which was overruled, and this was assigned for error.)

HARRISON, J. The first ground of demurrer is that the petition should not have been brought in the name of a private individual, but in the name of some officer authorized to represent the commonwealth. The practice contended for does not obtain in Virginia, and is not sustained by the weight of authority elsewhere. That private persons may move for mandamus to enforce a public duty, not due to the government as such, without the intervention of a law officer of the government, is settled by the highest authority. *Railroad Co. v. Hall*, 91 U. S. 355.

The court is further of the opinion that the motion to quash the petition was properly overruled. The first ground assigned in support of this motion was that the remedy was complete and adequate at law by a suit for damages. In order that the existence of another remedy shall constitute a bar to relief by mandamus, such other remedy must not only be "adequate", in the general sense of the term, but it must be specific and appropriate to the circumstances of the particular case. *The remedy at law which will operate as a bar to mandamus must generally be such a remedy as will enforce a right or the performance of a duty. A remedy cannot be said to be fully adequate to meet the justice and the necessities of a case, unless it reaches the end intended, and actually compels a performance of the duty in question.* Such other remedy, in order to constitute a bar to mandamus, must be adequate to place the injured party, as nearly as the circumstances of the case will permit, in the position which he occupied before the injury, or the omission of the duty complained of. The controlling question is not, "Has the party a

remedy at law?" but, "Is that remedy fully commensurate with the necessities and rights of the party, under all the circumstances of the particular case?" Or, as was said in one case: "To supersede the remedy by mandamus, the party must not only have a specific remedy, but one competent to afford relief upon the very subject-matter of the application, and one which is equally convenient, as beneficial or as effective, as the proceeding by mandamus." 2 Spelling Extr. Relief, § 1375.

In the case at bar the mandamus was sought to compel the plaintiff in error to transfer the defendant in error from one to another of its street cars without additional charge. If the defendant in error was entitled, as alleged, to the transfer, it is manifest that a suit at law for the damages for a failure to perform that duty was not an adequate remedy, and would not actually compel the performance of the duty in question. The wrong suffered was a constantly recurring and continual one, and, whatever may have been the result of the repeated suits for damages, the remedy was not as convenient, as beneficial or as effective, as the proceeding by mandamus.

(After holding that the terms and conditions prescribed by some other designated authority, when so fixed and prescribed become a part of the organic law of the corporation, and can be enforced by mandamus, the decision below was affirmed.)

See also, *Richardson v. Smith*, 7 *Houst. (Del.)* 137; *Notes* 89 *Am. Dec.* 728; 98 *Am. Dec.* 375; 51 *Am. Rep.* 78; 3 *Am. St. Rep.* 807; 7 *Am. St. Rep.* 484; 37 *Am. St. Rep.* 317; 59 *Am. St. Rep.* 198; *People v. Suburban R. R. Co.*, 178 *Ill.* 594; *Union Pac., etc., R. Co. v. Hall*, 91 *U. S.* 343; *State v. Republican Valley R. R. Co.*, 17 *Neb.* 647; *Lamphere v. Grand Lodge*, 47 *Mich.* 429; *Crane v. Chicago, etc., R. Co.*, 74 *Ia.* 330.

But see *State v. Canal Co.*, 23 *La. Ann.* 333; *San Antonio Street R. R. Co. v. State*, 90 *Texas*, 520.

STATE EX REL. LANYON v. JOPLIN WATER WORKS.

1892. COURT OF APPEALS OF MISSOURI. 52 *Mo. App.* 312.

GILL, J. The defendant water company, at the beginning of this suit, owned and operated a system of water works in the city of Joplin, wherein it had an exclusive right under and by virtue of an ordinance of said city. Section 14 of this ordinance attempts, as far as may be, to prescribe the rates or charges for consumers. It reads as follows: "§ 14. The water rates to consumers shall not exceed twenty-five cents per one thousand gallons, or one cent per barrel, approximated for the several purposes, as follows". Then appears a schedule of prices per annum for dwellings (so much per room), hotels, offices, stores, bakeries, saloons, butcher shops, soda

fountains, water closets, etc., concluding with this clause: "Rents for all purposes not hereinbefore enumerated will be fixed by estimate or meter measurement at a rate *pro rata* to quantity used, not exceeding in any instance twenty five cents per one thousand gallons, or one cent per barrel; provided, however, that the party requiring the meter must pay the expense of the same."

Plaintiff Lanyon erected at Joplin a family residence, and provided the same with the necessary pipes, etc., to supply it with water from the defendant's mains. He also put in at his own expense a meter of the most approved design. Lanyon then applied to the water company to turn in the water through his meter and into his dwelling, accompanying his application with a tender of the necessary prepayment of charges. The water company declined to supply water to be measured and paid for according to the meter, but did offer to let in water if plaintiff would pay according to the schedule of approximated prices. Thereupon Lanyon brought this action in mandamus to compel the company to turn on the water and supply his premises according to the meter rates. At the final hearing the circuit court awarded a peremptory writ as prayed by plaintiff, and defendant appealed.

The case must turn on the proper construction of section 14 (above quoted from) of the ordinance which grants the defendant its exclusive franchise to operate its waterworks in Joplin. The defendant takes the position that it is obliged under the terms of that section to supply water to residences and all other subjects specifically named, when and only when, the consumer shall pay, or offer to pay, the price affixed to each item, and that the company is not bound to supply water for any residence, or other subject so specifically named, on charges to be paid as per meter measurement at twenty five cents per one thousand gallons; while the plaintiff asserts the right to an option of taking water at the fixed rate named in the schedule or by placing a meter at his own expense, to have water supplied at the rate of twenty five cents per one thousand gallons, actual measurement.

In our opinion the plaintiff's position is the correct one. The manifest intention of the ordinance, it seems to us, was to fix the maximum charge for water at twenty five cents per one thousand gallons. If the consumer thinks proper he may decline to go to the expense of a meter, and accept the water to be furnished at the "approximated" or estimated schedule price. If, however, the water company's patron deems it best, or to his interest, he is left the choice of placing a meter at his own expense, and then the charge against him is no longer a guess or an estimate, but he will pay for the water actually used—no more, no less.

The relator Lanyon saw proper to adopt the latter course, and to have the water consumed on his premises measured. He consulted

with the officers of the defendant company as to the best character of meter, and placed it properly to receive the water that might be used. He was then, on payment or tender of the necessary charges, clearly entitled as a citizen of Joplin to have the water turned into his residence.

We hold too—against the contention of the defendant—mandamus to be the proper remedy in a case like this. The water company in the enjoyment of its franchise to lay pipes in the streets of Joplin has a monopoly to supply water to the inhabitants. It is there, to a certain extent, exercising the right of eminent domain. Its duties are of a public nature. It is bound by the terms of its grant to supply water from its mains to all citizens who may put themselves in a condition to demand and receive it. Should it fail or refuse to do so without just cause, then mandamus will lie to compel the performance of this duty. 2 Beach Private Corp., §§ 834-6; 2 Morawetz Private Corp., § 1132; Chicago, etc., R. Co. v. Hempstead, 56 Ill. 365; Webster Telephone Case, 17 Neb. 126-136-7. We have here the presence of a specific legal right and the absence of an effectual legal remedy, which clearly warrants a resort to mandamus.

We observe the point made by the defendant's counsel that the peremptory writ does not follow and conform to the alternative writ of mandamus. The learned counsel contends for the correct doctrine in the abstract, as announced in this state, *State ex rel. Millett v. Field*, 37 Mo. App. 83-100; and that is, that the peremptory writ can go no further nor vary in any substantial particular from the commands of the alternative writ. But we fail to discover here any material departure. The relator had become entitled, by reason of his providing a meter and the prepayment or tender of the necessary charges, to have the water turned into his premises. The alternative and peremptory writ substantially commanded this and nothing more.

The judgment is for the right party, and will be affirmed. All concur.

To compel cemetery to permit burial; *Mt. Moriah Cemetery Ass'n v. Commonwealth*, 81 Pa. St. 235.

To compel gas companies to furnish gas; *People v. Manhattan Gas Light Co.*, 45 Barb. (N. Y.) 136; *Mackin v. Portland Gas Co.*, 38 Oregon, 120.

To compel irrigating company to furnish water; *Price v. Irrigating Co.*, 56 Cal. 431; *Combs v. Ditch Co.*, 17 Colo. 146.

To compel telephone companies to furnish service; *Missouri v. Bell Tel. Co.*, 23 F. 539; *Central Union Tel. Co. v. State*, 118 Ind. 194; *State v. Neb. Tel. Co.*, 17 Neb. 126; *Gen. Dist. Tel. Co. v. Commonwealth*, 114 Pa. St. 592. *Contra—In re Baldwinsville Tel. Co.*, 24 Misc. (N. Y.) 221.

To compel railroads to increase number of trains (*Ohio, etc., R. Co. v. People*, 120 Ill. 200); to establish stations (*People v. N. Y., etc., R. Co.*, 104 N. Y. 58); to construct crossings (*Boggs v. Chicago, etc., R. Co.*, 54 Iowa, 435); to stop trains at station (*People v. Louisville, etc., R. Co.*, 120 Ill. 48).

PEOPLE EX REL. JACKSON v. SUBURBAN R. CO.

1899. SUPREME COURT OF ILLINOIS. 178 Ill. 594, 53 N. E. 349.

(APPELLEE company was chartered under the laws of Illinois for the purpose of owning, operating and maintaining electric lines of street cars. An ordinance of the village of River Forest authorized appellee company to enter and make use of the streets, alleys and highways of said village for the operation of a street suburban railroad to Chicago, provided (among a number of other conditions imposed by said ordinance on the railroad company) that the fare between any point in the village of River Forest and the city of Chicago should not exceed the fare charged from any point in the town of Cicero to Chicago or return, either for a single trip, or at commutation rates, or otherwise. The ordinance further provided that upon a failure to comply with the terms and conditions thereof, said ordinance should become absolutely null and void. Petition, among other things, charged that appellee company offered for sale and sold, passenger tickets of twelve rides for \$1," good for one continuous ride over its line in the town of Cicero only to points in Chicago" and refused and neglected to sell twelve tickets for \$1 good from points in River Forest to Chicago but charged a cash fare of ten cents for each and every ride from River Forest to Chicago, and refused and neglected to accept said tickets sold at the rate of twelve for \$1 for rides entering into or from River Forest. Petition prays for a writ of mandamus, directed to the company, its officers and agents commanding them that so long as tickets are sold at the rate of twelve for \$1 good for rides from and to the towns of Cicero and Chicago, said company shall also sell tickets at the same rate good from and to River Forest and Chicago.)

Boggs, J. (after stating the facts).

It is urged that the writ is here sought to be availed of for the purpose of securing the fulfillment of the terms and conditions of a private contract, and that it is fundamental law that mere contract obligations cannot be enforced by mandamus. The appellee is a *quasi*-public corporation. The sovereign power, when granting a public franchise to corporations of that character, may declare that certain acts, in the nature of duties to the public, shall be performed by the corporation to or upon whom the franchise is conferred, and may provide that the investiture of the franchise shall be conditional upon the acceptance of the burden of performing such acts or service. It is now well settled that, when there is the grant and the acceptance of a public franchise involving the performance of such acts or service, the corporation accepting the franchise, may be compelled by the writ of mandamus to perform the duty so enjoined by the grant, and consented to by the acceptance thereof. Merrill

Mand. §§ 27, 157, 159; *Haugen v. Water Co.*, 21 Oreg. 411, 28 Pac. 244; *Indianapolis, etc., R. Co. v. State*, 37 Ind. 489; *City of Potwin Place v. Topeka R. Co.*, 51 Kan. 609, 33 Pac. 309; *San Antonia St. R. Co. v. State*, 38 S. W. 55, (Texas Civ. App.)

But it is insisted that the authority granted the respondent company by the ordinance under consideration is not a franchise, but a mere license, and which, having been acted upon, has become irrevocable; and the *City of Belleville v. Citizens R. Co.*, 152 Ill. 171, 38 N. E. 584, is cited as in support of the contention. The general assembly representing the people at large, possesses full and paramount power over all highways, streets, alleys and like public places in the state. Had the charter which gives life to the respondent company been granted upon the conditions expressed in the ordinance under consideration, and had the company accepted the charter as it did the ordinance, and acted under it in like manner as it did under the ordinance, the enforcement of the service and duties imposed by the charter might, it is clear, have been accomplished by the aid of the writ of mandamus, though the right obtained by the charter to enter upon the streets of the village be in such a case but a license. The state does not, however, exercise that full, paramount power which it possesses over streets, alleys, etc.; but in the distribution of governmental powers the general assembly adopted the policy of selecting the cities and villages of the state as governmental agencies, and delegating to such municipalities the power to regulate and control the use of the streets, alleys, etc., within their respective limits. Such power thus delegated is exercised by the municipal authorities acting in behalf of the state for the benefit of the public. While it is true that the charter of a street railway corporation is granted under the general laws of the state, yet a charter so obtained gives but the bare power to exist. In order to enable such a corporation to carry out the sole purpose for which it has existence, it must have a further exercise of sovereign power in its behalf. Some city or village, clothed by delegation, with authority to exercise sovereign power possessed by the state, must grant such corporation authority to enter upon its streets and alleys and construct and operate its road thereon. The power possessed by the state to attach as conditions to such a grant the performance of duties owing by a *quasi*-public corporation to the public, and directly beneficial to the public, may be exercised by a municipality in the exercise of the power by it possessed by delegation from the state to permit the use of its streets, alleys and public places by the corporation. It is clearly shown by the petition and ordinance that the appellant company is operating a street railway. It is invested with corporate life and was granted corporate power to enable it to serve the public as a public carrier of passengers. *Its property is impressed with a public use, and it must exert its powers for the*

benefit of the public. It is not a private, but a quasi-public, corporation, and it owes it as a duty to the public to demand reasonable rates only for the transportation of passengers, and to serve its patrons without unjust discrimination, and this duty may be enforced by the state, acting directly or through a governmental agency. Water Co. v. Fergus, 178 Ill. 571, 53 N. E. 363. The ordinance, the acceptance thereof, and the enjoyment of the benefits of its provisions, by the respondent company must be regarded as establishing, so far as the respondent company is concerned, and as estopping it to deny, that the exaction of a greater sum for the transportation of passengers, from its stopping place in the village of River Forest to the city of Chicago, than is demanded for the like service from stopping places on its line within the specified portion of the town of Cicero is an unreasonable exaction, and unjust discrimination against those of the public who may desire to reach the city of Chicago from the village of River Forest by way of the cars of the respondent company. That being established, compliance with the provisions of the ordinance in the respect named becomes a duty owing to the public, the performance whereof is within the right and power of the village, acting as the agency of the state, to secure by means of the conditions incorporated in the ordinance. The fact that the ordinance required that the company should formally accept it as conditioned had no effect to render the grant a mere private contract. The state, through the village as its representative, was acting, and the power which was exercised by the village was that of the sovereign. That which the ordinance required that the company should do and should consent to do did not become mere contract obligations on the part of the company to perform acts beneficial to the village. The village, as a corporate entity, had no interest whatever in the acts to be performed. Compliance with the ordinance in the respect under consideration was not beneficial to the village in its corporate capacity, but was a duty to the public, to be performed by the company for the benefit of the public. There is nothing in the nature of that duty rendering it impracticable to enforce the performance of it by the writ of mandamus, and, in our view, the writ may be invoked to secure observation by the respondent company.

Respondent, treating the duties imposed upon it as mere contract obligations, argues that the undertakings are wholly without consideration. In the absence of the ordinance, the respondent company had no power or right to enter upon the streets of the village, and erect poles, string wires thereon, and construct and operate its road by electricity upon and along the streets. These privileges constitute ample consideration, if any could be deemed necessary. The privileges granted the respondent company by the terms of the ordinance have been, and are being, fully enjoyed by it. It cannot be permitted to take and retain all advantages and benefits of the ordi-

nance, and escape performance of duties to the public, upon which its rights to such advantages and privileges are predicated, upon the ground that the ordinance and the duties imposed by it are *ultra vires* both the village and the respondent company. The plea of *ultra vires* will not, as a general rule, prevail when it will not advance justice, but will, on the contrary, accomplish a legal wrong; and it is a general rule that undertakings, though they be *ultra vires*, will be enforced against *quasi*-public corporations, if said corporations retain and enjoy the benefit of concessions granted on conditions that such benefits should be performed. *Brewing Co. v. Flannery*, 137 Ill. 309, 27 N. E. 286; *Kadisch v. Association*, 151 Ill. 531, 38 N. E. 236; *Eckman v. Chicago, etc., R. Co.*, 169 Ill. 312, 48 N. E. 496.

Whether mandamus will lie to compel the respondent company to transport passengers beyond its own line does not arise. It appears from the petition that the respondent company has perfected running arrangements with other lines of railroad, and is engaged in transporting its passengers, by means of its own cars, and the cars of connecting lines, to and around the loop in the city of Chicago, and that it offers such service at all points in the village of River Forest; and the complaint is that it exacts a greater rate of fare for twelve continuous rides from points in the village of River Forest to and around the loop in the city of Chicago than is charged for a like number of rides from the designated points in the town of Cicero, contrary to its duty and obligation under the ordinance. The purpose of the petition is not to require the respondent to make arrangements with connecting carriers to carry passengers beyond its own line, for such arrangements already exist, and the respondent company is engaged in the business of furnishing transportation from the village of River Forest to and from the city of Chicago; but the design of the writ is to prevent discrimination in rates charged at points in the village and in that portion of the town of Cicero specified in the ordinance.

There is no force in the point, vigorously pressed, that, if mandamus will lie, it cannot be granted at the application of the relator in this petition. The village, in its corporate capacity, has no interest in the enforcement of duties owing by the company to the public. As a corporate entity, the village is not affected by compliance or non-compliance with the rates of fare charged or collected by the respondent from the passengers. The writ relates to a matter affecting the public. The people are regarded as the real party, and it need not appear that the relator has any legal interest in the result. It is enough that he is a citizen, and is interested, as a citizen, in having the right enforced. *Commissioners v. People*, 11 Ill. 202; *City of Ottawa v. People*, 48 Ill. 233; *Hall v. People*, 57 Ill. 307. The demurrer must be and is overruled.

The judgment of the court is that a peremptory writ of mandamus

issue, commanding the respondent, said Suburban Railroad Company, that at all times when it shall sell or cause to be sold said tickets of twelve rides for \$1, good for one continuous ride from any stopping point in the town of Cicero west of the east line of Central Avenue, in said town, over the lines of said suburban Railroad Company and the said Lake Street Elevated Railway Company to and from any point on the Union Loop in the City of Chicago, said Suburban Railroad Company, shall also sell or cause to be sold, on demand, passenger tickets of twelve rides for \$1, each, good from any stopping point on its said railroad line, in the village of River Forest, over the lines of said Suburban Railroad Company and the said Lake Street Elevated Railway Company to and from any point on the said Union Loop in the city of Chicago, with equal facilities for the purchase of said tickets, as prayed in the petition.

Writ awarded.

In accord.—*Rex v. Severn & Wye R. R. Co.*, 2 Barn. & Ald. 646; *Commissioners v. Portland, etc.*, R. R. Co., 63 Me. 269; *State v. Sioux City & P. R. R. Co.*, 7 Neb. 357; *City v. Topeka R. Co.*, 51 Kan. 609.

Contra, *People v. Rome, etc.*, R. Co., 103 N. Y. 95; *People v. New York, etc.*, R. Co., 104 N. Y. 58; *Northern Pac. R. Co. v. Washington Ter.*, 142 U. S. 492; *San Antonio Street R. R. Co. v. Texas*, 90 Tex. 520.

To compel transportation companies to furnish facilities to passengers and especially shippers without discrimination; *Commonwealth v. Eastern R. R. Co.*, 103 Mass. 254; *Wells-Fargo & Co. v. Northern Pac. R. R. Co.*, 23 Fed. 469; *State v. Freemeont, etc.*, R. Co., 22 Neb. 313; *People v. Louisville, etc.*, R. Co., 120 Ill. 48; *Covington Co. v. Keith*, 139 U. S. 128; *Attorney General v. American Ex. Co.*, 118 Mich. 682; *Richmond etc., R. Co. v. Brown*, 97 Va. 26; *State v. Texas & Pac. R. Co.*, 52 La. Ann. 1850.

Contra—See cases above *contra* and *State v. Missouri Pac. R. R. Co.*, 55 Kan. 708; *Saylor v. Pennsylvania Canal Co.*, 183 Pa. St. 167.

2. To correct amotion from a corporation.

STATE EX REL. WARING v. GEORGIA MEDICAL SOCIETY.

1869. SUPREME COURT OF GEORGIA. 38 Ga. 608, 95 Am. Dec. 408.

{PETITION for a mandamus to restore relator to membership in defendant society. Relator alleged that he had been unlawfully and unconstitutionally expelled from membership and deprived of his right and franchise as a corporator in said society. The society had the usual authority to make by-laws not inconsistent with its charter or the laws of the United States and of Georgia and these by-laws contained the provision that "any member who shall be guilty of ungentlemanly conduct during any session of the society, or who shall conduct himself out of the society, in such a manner

as would render him ineligible to membership, shall be expelled from the society according to the wishes of two-thirds of the members of the society present; provided that in every instance specific charges be set forth and handed to the individual at least one month before the society takes action thereon." Relator was charged with having become surety for one White, a person of color, indicted for larceny and who had been elected clerk of the court in opposition to the wishes of the entire respectable community; that relator had also become surety for other persons of color, charged with riot; also that relator had made a charge for a dispensary prescription which was furnished free of charge by the city; also that relator had consulted with a physician not a member of the society, etc. Relator was given proper notice and expelled by a two-thirds vote.

The society's answer besides setting up want of jurisdiction in the court, set forth the above facts. Relator moved to quash the answer as being insufficient; lower court overruled the motion, and Waring appealed.)

BROWN, C. J.—It was insisted in this case, that the Georgia Medical Society was in existence long before it was incorporated, and that its objects were in no way changed by its application for and its acceptance of its present charter from the state. This may be very true but its legal responsibilities were changed by the acceptance of the charter. *While it remained a voluntary society, the courts had no jurisdiction over it, if it violated no law of the state, and its members had no property in their membership which the law could protect. But its acceptance of the charter subjected it to the supervision of the proper legal authorities having jurisdiction in such cases; Dartmouth College Case, 4 Wheat. (U. S.) 674-5; Fuller v. Plainfield Ac. School, 6 Conn. 544-5.*

When the voluntary society accepted the charter, it became a private, civil corporation, and the corporators, then in being, acquired a property in the franchise, and every person who has since become a corporator has acquired a like property. The property which the corporator acquires is not visible, tangible property; but is none the less property, because it is invisible, and intangible. It is not a corporeal hereditament, but an incorporeal one. Blackstone, in his Commentaries, volume 2, p. 21, says: That incorporeal hereditaments are divided into ten sorts; one of these consists of franchises. Bouvier, in his Law Dictionary, volume 1, p. 593, says the word franchise has several meanings, one of which he gives as follows: "It is a certain privilege conferred by grant from the government and vested in individuals. Corporations or bodies politic are the most usual franchise known to our law." The law books are full of the doctrine that persons may have a property in incorporeal hereditaments, franchises, etc. Property, says Bouvier, volume 2,

p. 381, is divided into corporeal and incorporeal. The former comprehends such property as is perceptible to the senses, as lands, houses, goods, merchandise and the like. Blackstone says, volume 2, p. 37, it is likewise a franchise for a number of persons to be incorporated and exist as a body politic, with power to maintain perpetual succession, and to do other corporate acts, and each individual member of such corporation is also said to have a franchise or freedom. We think it is well settled by these and other authorities, that a corporator in a private, civil corporation, has a property in the franchise, of which he cannot be deprived without due process of law.

It was insisted by the learned counsel for the plaintiff in error, that the ninth by-law of this corporation is unauthorized by the charter and that the corporation is not justifiable in expelling a member for its violation; that to deprive a corporator of his property in the franchise under it is to deprive him of his property without due process of law. We think the ninth by-law a proper one in view of the objects of the society, and we hold that the charter conferred upon the corporation the power to ordain and establish it, and that they have the power to expel a member when a proper case arises under it.

But we hold that the society has not an uncontrollable discretion in its construction and enforcement. They cannot, under pretext of enforcing this rule, take personal or private revenge, or make it the instrument of religious intolerance, or political proscription. When a member feels that he is aggrieved or injured by the illegal or oppressive acts of the body, it is his right to appeal to the courts for redress or protection; and it is the right and duty of the court to investigate such charges, when properly before it, and to judge of the legality of the action of the society in expelling a member or depriving him of any other legal right.

The rule of law on this subject is thus stated by Judge Blackstone, volume 1, p. 381. "The king being thus constituted by law, visitor of all civil corporations, the law has also appointed the place where he shall exercise this jurisdiction, which is the court of king's bench, where, and where only, all misbehaviors of this kind of corporations are inquired into and redressed, and all their controversies decided." In this state the same visitorial power of correcting the misbehaviors of these corporations, and deciding their controversies, is vested in the superior courts of the counties where they are located, which in England belongs to the king's bench. See *Slee v. Bloom*, 5 Johns. Ch. (N. Y.) 335.

It was contended with much zeal and ability, by the able counsel for the defendant in error, that mandamus is not the proper remedy, even if we admit the rights of Dr. Waring have been infringed, or that he has been deprived of them by the illegal action of the society. The rule, as laid down by this court in a number of cases is, that

any person having a clear legal right, under the laws of this state, is entitled to the writ of mandamus, if he has no other remedy to enforce it. *Mayor v. State*, 4 Ca. 26; *Napier v. Poe*, 12 Ga. 170; *Habersham v. Canal Co.* 26 Ga. 665.

But it is insisted that the code, § 3143, has changed this rule, and that mandamus does not now lie as a private remedy between individuals to enforce private rights. We do not think this section of the code was intended to deny this writ to the corporator, who is deprived of his rights by the corporation, when he has no other adequate remedy for their enforcement. A corporation having been created, invested with certain powers, and charged with certain duties to be performed for the benefit of the public, is not a private individual in the sense of the word as used in said section of the code, and a corporator whose rights are violated or withheld from him by the corporation, who is without other remedy, is entitled to the writ.

In the Commonwealth *ex rel.* etc., v. The Mayor of Lancaster, 5 Watts (Penn.) 152, GIBSON, C. J., says: "An action to enforce the right could not be maintained against the corporation because performance of a corporate function is not a duty to be demanded by action, and unless recourse could be had to the functionary in the first instance, the relator might have a cause for redress without a remedy." See *Mayor v. State*, *supra*.

Here the discharge of a corporate duty is treated as an office or function, and the corporation as a functionary. In this sense, no doubt, the legislature in the adoption of the code, intended to treat them.

The object of this society, as stated in their charter, was "for the purpose of lessening the fatality induced by climate and incidental causes, and improving the science of medicine." The whole community having an interest in the success of the laudable undertaking; and if the functions conferred by the charter, for the benefit of the public are not faithfully performed, and one of the corporators, who has no other adequate redress, is injured by the conduct of the corporation (the functionary), the courts will grant him relief by mandamus.

The record in this case shows no sufficient cause to justify the society in expelling Dr. Waring from his rights and privileges as a corporator. He was expelled for doing that which the law of this state not only authorizes but encourages. His offending consists in the fact that he became one of the sureties on the official bond of one of the colored citizens of his county, who had been elected clerk of the superior court of the county, by a majority of the legal votes cast at the election for that office, and in the further fact that he became the surety on the bonds of certain other colored citizens who were charged with the offense of riot, for their appear-

ance at court to answer as the law directs. The very fact that the law requires the clerk of the superior court to give bond and surety for the faithful discharge of his duties, is sufficient to justify any citizen of the county in becoming one of his sureties, and to protect him, in contemplation of law, from the imputation of having forfeited his position as a gentleman by so doing.

Again, it is not the object of law to punish citizens of this state whether white or black, by imprisonment, for offences of which they have never been convicted. When they are charged with violations of the penal code, the requirement of the law is, that they appear at the proper time and place, and answer the charge; and to secure such appearance, they are required to give bond and security, and it is only on their failure to give the bond that they can be imprisoned. As innocent persons are often confined in prison under charges, because of their inability to give bond, the law favors bail whenever the offense is, by law, bailable. And the law favors this even in the case of the guilty, until trial. This is not only best for the public, as it saves the taxpayers the expense of keeping them in jail, but is just to the accused, who receive the legal punishment for their crimes, if guilty, under the sentence of the court after legal conviction. How, then, does a citizen forfeit his corporate rights as a member of a civil corporation, or his position as a gentleman, by doing an act that is not only encouraged by the laws of his state, but is a positive public benefit?

But it is said that Dr. Waring was not expelled for becoming surety on the bonds above mentioned, but for ungentlemanly conduct in the presence of the society. What ungentlemanly conduct? The ninth by-law requires that "specific charges" be set forth and handed to the accused at least one month before the society takes action thereon. What specific charges of ungentlemanly conduct in the presence of the society, were ever handed to Dr. Waring? What did he say or do in the presence of the society, to forfeit his position as a gentleman? The record is silent. That silence is significant. That which is material and is not averred by the society in their answer is presumed not to exist. No ungentlemanly conduct in the presence of the society is set forth in their response, and this court must presume that none existed.

Dr. Waring was convicted of the charges first mentioned in reference to the suretyship, and brought formally before the society and censured. To this illegal and unauthorized proceeding he submitted. But, not satisfied with this, at the next meeting of the society he was again brought up, and his resignation demanded, and he was given until the succeeding meeting to comply with the imperious and unauthorized demand. This he declined to do. And a preamble and resolution were then passed, setting a future day when the society would vote on his expulsion for refusing to

resign, and for discourteous behavior toward the society at two former meetings. In what the discourteous behavior consisted we are not informed by the record. In the meantime, however, the gracious privilege of avoiding expulsion by resignation was held out to Dr. Waring. When the time came for the much cherished object by the infliction of the extreme penalty of expulsion, Dr. Waring was at home sick, and unable to attend, but he wrote the society, disclaiming all intentional discourtesy to the society or its members, and protested against the irregularity and illegality of the course resolved upon, as set forth in said preamble and resolutions. But all to no effect. His expulsion was predetermined and that determination was executed. A more illegal or unjustifiable proceeding has seldom been brought before a court.

After argument had, and a thorough examination of this case, it is the unanimous judgment of this court that the judgment of the court below be reversed, and the judge of the superior courts of said county is hereby instructed and ordered to grant a peremptory mandamus commanding and compelling the "Georgia Medical Society" to restore the said Dr. James J. Waring to all his rights and privileges as a member in said society.

See also, *People v. Medical Society*, 32 N. Y. 187; *State v. White*, 82 Ind. 278; *Von Arx v. San Francisco, etc., Verein*, 113 Cal. 377; *State v. Fraternal, etc., Circle*, 9 Ohio Cir. Ct. Rep. 364; *Lysaght v. St. Louis, etc., Stone Mason's Ass'n*, 55 Mo. App. 538.

And compare *Roehler v. Aid Society*, 22 Mich. 86; *State v. Chamber of Commerce*, 20 Wis. 68; *Ex parte Paine*, 1 Hill (N. Y.) 665.

In the case of mere voluntary associations the courts rarely interfere; where, however, property rights are involved it would seem, in the absence of another remedy, that Mandamus would properly lie. See *People v. Chicago Bd. of Trade*, 80 Ill. 134; *State v. Milwaukee Chamber of Commerce*, 47 Wis. 670; *People v. German, etc., Church*, 53 N. Y. 103; *Barrows v. Massachusetts Med. Society*, 12 Cush. (Mass.) 402.

3. To enforce the right to inspect books and records.

IN RE PETITION OF HENRY W. T. STEINWAY, FOR INSPECTION OF BOOKS AND RECORDS OF STEINWAY & SONS.

1899. NEW YORK COURT OF APPEALS. 159 N. Y. 250, 45 L. R. A. 461.

VANN, J. delivered the opinion of the court.

Steinway & Sons, once a co-partnership, became a corporation in 1876, under the general manufacturing act of 1848, and the relator has been a stockholder therein ever since. He now holds 1,440 shares of its stock, of the par value of \$144,000, out of a total of 20,000 shares, of the value of \$2,000,000, but with an actual value much in excess of that sum. He has not been an officer of the corporation since 1881, and he has had no means of knowing much about the management of its affairs since 1892, when he was given an opportunity to examine the books. Since then he has been substantially ignorant as to all the details of the management, and has had no access to the books or the records. Learning of certain practices that he considered improper, on April 12, 1894, and March 27, 1895, he made protests in writing to the company, but no attention was paid to them. On the 6th of April, 1896, he made a written request for leave to examine the books, but receiving no reply on the 15th of that month he wrote requesting information, proper in character, upon certain subjects; and to this communication, he received an answer from the secretary, dated April 23, 1896, written in behalf of the board of trustees, virtually refusing the information asked for, on the ground that the relator intended to use it in "hostility to the interest of the stockholders." On the 5th of April, 1897, he endeavored to ascertain certain material facts at the annual meeting, but without success; and thereupon he requested the officers and directors to afford his accountants and attorneys access to the books of account, vouchers and records of the company for the years 1892 to 1896 inclusive, for the purpose of examining the same. Receiving no reply on the 8th of May, 1897, he served a written request upon the treasurer for a statement in writing under oath, of the affairs of the company, embracing a particular account of all its assets, and its liabilities for each of the several fiscal years from 1892 to 1896, inclusive; and in response to this he received a general statement placing the assets at more than \$3,000,000, but distributed into only fourteen items, eight of which were over \$100,000 each. The liabilities included but eight items, three of which were the capital stock, the surplus, and the profit of

1896. This was the first information as to the company's affairs which the petitioner had been able to obtain in five years, except that he once saw the balance sheet and inventory of 1893. Since 1891 the dividends declared by the company have dwindled in amount. In 1896 the dividend was only five per cent. but never before since 1883 had less than 10 per cent. and sometimes as much as 18 or 20 per cent., been divided in dividends. The relator claimed in his petition for a writ of mandamus to permit inspection of the books, that the officers of the corporation were engaged in an attempt to form an English stock company for the control of its business, with the design of selling their shares of the capital stock, or exchanging them for a much greater number of shares of stock in the English company, and that efforts had been made by the stockholders and directors to induce him to sell his stock at \$250 per share; but, as he insisted, it was impossible for him to fix upon any price without an opportunity to investigate the condition of the company. He specified various acts which he alleged to be improper on the part of the officers, such as the payment of exorbitant rentals, carrying on a banking business, allowing unusual rates of interest, inventorying the assets too low, and paying the trustees salaries, with no equivalent in services. The opposing affidavits contain a large amount of matter relating to aggravating conduct on the part of the relator in the past, and alleging improper motives and ulterior aims on his part. Many general allegations of the petition were denied in *haec verba*, without stating the real facts. The president, and other officers of the corporation, denied the allegations of improper conduct on their part, and claimed that the relator wished to force them to buy out at an extravagant price. As no alternative writ was issued, and the relator proceeded to argument upon his petition and the opposing affidavits, his right to a peremptory writ depends upon the conceded facts, the same as if he had demurred to the allegations of the defendants. *People v. New York Central, etc. R. Co.*, 156 N. Y. 570; *Haebler v. New York Produce Exchange*, 149 N. Y. 414; *People v. Brooklyn*, 149 N. Y. 215; *People v. Rome, etc. R. Co.* 103 N. Y. 95; *Code Civ. Proc.* § 2070.

(The appellate division certified the following question for decision: "Has the supreme court the power, upon the petition of a stockholder, to compel by mandamus the corporation to exhibit its books for inspection?" The court of appeals held that all the powers of the court of king's bench and the court of chancery, as they existed when the first constitution of New York was adopted, blended and continued in the supreme court of the state, except as modified by the constitution or statute.)

The right of a corporator, who has an interest, in common with the other corporators, to inspect the books and papers of the corporation, for a proper purpose and under reasonable circumstances,

was recognized by the court of king's bench and chancery from an early day, and enforced by motion or mandamus, but always with caution, so as to prevent abuse. *Rex v. Newcastle-upon-Tyne*, 2 Str. (K. B.) 1223, and note; *Gery v. Hopkins*, 7 Mod. Rep. (K. B.) 129, case 175; *Richards v. Pattison*, Barnes (Notes of Cases) 235; *Young v. Lynch*, 1 W. Blackstone, 27; *Rex v. Shelley*, 3 T. R. (K. B.) 141; *King v. Babb*, 3 T. R. (K. B.) 579, 580; *King v. Merchants Tailors, Co.*, 2 Barn. & Ald. (K. B.) 115; *Re Burton*, 31 L. J. (O. B. N. S.) 62; *Re West Devon Great Consols Mine*, Law Rep. 27 (Ch. Div.) 106. Lord Kenyon, in rendering a judgment in *King v. Babb*, assumed "that in certain cases the members of a corporation may be permitted to inspect all papers relating to the corporation." In *Gery v. Hopkins*, the court on granting the order to produce, said: "There is great reason for it, for they are books of a public company and kept for public transactions, in which the public are concerned, and the books are the title of the buyers of stocks, by act of Parliament." In *Rex v. Newcastle-on-Tyne*, the reporter states that the court said: "Every member of the corporation had, as such, a right to look into the books for any matter that concerned himself, though it was a dispute with others."

The courts of other states compel the officers of corporations to allow the stockholders to examine the books upon due application for a proper purpose. In *Lewis v. Brainerd*, 53 Vt. 520, the court said: "The shareholders in a corporation hold a franchise and are the owners of the corporate property; and as such owners they have the right, at common law, to examine and inspect all the books and records of the corporation at all seasonable times, and to be thereby informed of the condition of the corporation and its property." In *Huyler v. Craigin Cattle Co.*, 40 N. J. Eq. 392, 398, it was said: "Stockholders are entitled to inspect the books of the company for proper purposes at proper times, and they are entitled to such inspection, though their only object is to ascertain whether their affairs have been mismanaged or that their interests have been properly conducted by the directors or the managers. Such a right is necessary to their protection. To say that they have the right, but that it can be enforced only when they have been ascertained in some way, without the books, that their affairs have been mismanaged or that their interests are in danger, is practically to deny the right in the majority of cases. Often times frauds are discoverable only by an examination of the books by an expert accountant. The books are not the private property of the directors or the managers, but are the records of their transactions as trustees for the stockholders." In *Commonwealth v. Phoenix Iron Co.*, 105 Pa. 111, 116, 51 Am. Rep. 184, the rule was laid down that "unless the charter provides otherwise, a shareholder in a trading corporation has the right to inspect the books and papers, and to make minutes

from them, for a definite and proper purpose, at reasonable times. The doctrine of the law is that the books and papers of the corporation, though of necessity kept in some one hand, are the common property of all the stockholders." Upon a second appeal in the same case, *sub nom.* Phoenix Iron Co. v. Commonwealth, 113 Pa. 563, 572, the court said: "Under the circumstances mentioned, and for the purposes stated, we are of the opinion that, and according to our ruling, when the case was here before, the relator is clearly entitled to an examination of the books and papers of the company. Such a right is, of course, not to be exercised to gratify curiosity or for speculative purposes, but in good faith and for a specific honest purpose, and where there is a particular matter in dispute, involving and affecting seriously the rights of the relator as a stockholder. * * *

A stockholder in a trading corporation must certainly have some rights which a board of directors should respect. Sellers (the relator) was not bound to accept the mere statement of the board, whether under oath or otherwise, as to the contents of the books, etc. He had a right to a reasonable inspection of them, and, with the aid of a disinterested expert, might make such extracts as were reasonably required in the preparation of the bill he purposed to bring. The relator, we think, has a clear right, under the writ and return, to the relief he asks, and it is plain that he has no specific legal remedy for the enforcement of that right; and the existence of a supposed equitable remedy is not a ground for refusing the mandamus." In *Cockburn v. Union Bank*, 13 La. Ann. 289, 290, the court, in granting a mandamus requiring the officers of a corporation to allow access by a stockholder to the books, said: "A stockholder in a corporation possesses all his individual rights, except so far as he is deprived of them by the charter or the law of the land; as long, then, as the charter, or the rules and by-laws passed in conformity thereto, and the law, do not restrict his individual rights, he possesses them in full, and can demand to exercise them. It cannot be denied that it is the right of everyone to see that his property is well managed, and to have access to the proper sources of knowledge in this respect." The same court, in a like case, declared that a stockholder in a trading corporation "has, in the very nature of things, and upon principles of equity, good faith, and fair dealing, the right to know how the affairs of the company are conducted,—whether the capital of which he has contributed so large a share is being prudently and profitably employed or otherwise. In order to comply with this call, and to vote understandingly, it was certainly requisite for the relator, to know the condition of the affairs and the business operations of the company, and be enabled from this knowledge to act for the best interests of the stockholders and the company." *State v. Bienville Oil Works Co.*, 28 La. Ann. 204, 208. See also *Stone v. Kellogg*, 165 Ill. 192, 46 N. E. 222; *Stettauer v. Construction Co.*,

42 N. J. Eq. 46; *People v. Walker*, 9 Mich. 328; *State v. Berghenthal*, 72 Wis. 314.

The elementary works unite in holding that the corporator has the right in question, and that mandamus is the proper remedy. Mr. Wait, in his work on Insolvent Corporations, after reviewing the authorities says: "It will be apparent from an examination of these authorities that the rule in favor of a stockholder's right of inspection and investigation of corporate books and papers is becoming very broad and general." § 504. But, while the learned author recognizes the rule, he insists—and we agree with him—that an inspection should not be "granted to facilitate speculative schemes or to gratify idle curiosity." He declares that "mandamus is the most complete and effective form of redress available to a stockholder or party in case of the denial of the right of inspection." § 516. Mr. Cook, in discussing the question, says that "the stockholders of a corporation had, at common law, a right to examine at any reasonable time and for any reasonable purpose, any one or all of the books of the corporation. This rule grew out of the analogous rule applicable to public corporations and to ordinary copartnerships, the books of which, by well established law, are always open to the investigation of members. 2 Cook Stock & Stockholders, § 511. "The prevailing doctrine in the United States is said to permit an incorporator the same freedom in examining the books of the company as a partner has with respect to the books of his firm. But the right only extends to such documents as are necessary to the stockholder's particular purpose. Statutes giving the shareholders of corporations the right to inspect the corporate books have been passed in many of the American states and in England. These statutes, however, do not supplant the common law right." 1 Beach Private Corp., § 75. Judge Thompson, in his work on Corporations says: "One of the principles incident to ownership of stock in a corporation is that of an inspection of the books and the condition of the company, and this privilege, in general, becomes a right when the inspection is sought at the proper time and for the proper purposes." § 4406. He further declares that when the right is guaranteed by statute the motive for its exercise is immaterial, but when it rests upon the common law it will not be allowed for speculative purposes, the gratification of curiosity, or where its exercise would produce great inconvenience. §§ 4412-4420. See also *Angel & Ames Corp.*, 9th Ed., § 681; *Morawetz Priv. Corp.*, § 473; *High Extr. Leg. Rem.*, § 308, 19 Am. & Eng. Ency. of Law, p. 231.

We think that, according to the decided weight of authority, a stockholder has the right at common law to inspect the books of his corporation at the proper time and place, and for a proper purpose, and that, if this right is refused by the officer in charge, a writ of mandamus may issue, in the sound discretion of the court, with suit-

able safe-guards to protect the interests of all concerned. It should not be issued to protect a blackmailer, nor withheld simply because the interest of the stockholder is small; but the court should proceed cautiously and discreetly, according to the facts of the particular case. To the extent, however, that an absolute right is conferred by the statute, nothing is left to the discretion of the court; but the writ should issue as a matter of course although even then, doubtless, due precaution may be taken as to time and place, so as to prevent interruption of business or other serious inconvenience.

The appellants, however, insist that certain statutory provisions relating to the subject are exclusive, and, as they do not extend to the case under consideration, that the appellate division had no right to grant the writ.

We think that the common law right of a stockholder with reference to the inspection of the books of his corporation still exists unimpaired by legislation; that the supreme court has power, in its sound discretion, upon good cause shown to enforce the right; and that such power is a part of its general jurisdiction as the successor of the courts of the colony of New York, which had the jurisdiction of the court at king's bench and the court of chancery in England.

It follows that the order appealed from should be affirmed, with costs, and that the question certified should be answered in the affirmative.

All concur.

See also, *Lewis v. Brainerd*, 53 Vt. 510; *Stone v. Kellogg*, 165 Ill. 192; *State v. Laughlin*, 53 Mo. App. 542; *Rex v. Newcastle, etc.*, 2 Strange, 1223; *Lyon v. American Screw Co.*, 16 R. I. 472; *Ellsworth v. Dorwart*, 95 Iowa 108; *State v. St. Louis & S. F. R. R. Co.*, 29 Mo. App. 301; *Weihenmayer v. Bitner*, 88 Md. 325.

Right to make memoranda and take copies; *Deaderick v. Wilson*, 8 Baxt. (Tenn.) 108; *Hyde v. Holmes*, 2 Molloy 372; *Swift v. Richardson*, 7 Houst. (Del.) 338.

As against foreign corporations; *Richardson v. Swift*, 7 Houst. (Del.) 338, and *People v. Northern Pac. R. R. Co.* 18 Jones & S. (N. Y.) 456. *Contra—Re Rappleye*, 59 N. Y. S. 338.

As against insolvent corporations see *Chable v. Nicaragua Canal Construction Co.*, 59 Fed. Rep. 846.

See generally the very valuable note appended to 45 L. R. A. 456.

4. To compel a transfer of shares of stock.

STATE EX REL. BROSS ET AL. V. CARPENTER ET AL.

1894. SUPREME COURT OF OHIO. 51 Ohio St. 83; 46 Am. St. Rep. 556; 37 N. E. 261.

WILLIAMS, J. The original action was mandamus, brought in the court of common pleas of Ashtabula county by the plaintiff in error against the president, secretary and treasurer of the Baker Engine & Machine Company, a manufacturing corporation organized in this state, to compel them to issue to the relators, Bross and Baker, certificates for 310 shares of the company's stock, of \$100 each, which it is alleged the relators duly subscribed and paid for, and for which the defendant refuses to issue certificates to them. The relators allege, in general terms, that they have no adequate remedy at law, and pray for a peremptory writ. The answer denies that the relators paid for the stock, or paid any sum whatever on their subscription, and avers that they are indebted to the company for the full amount thereof, namely, \$31,000. The court found the issues for the defendants, and found furthermore, that the remedy of the relators at law was adequate, and on both grounds denied the writ. The circuit court to which the cause was taken on appeal, stated its conclusions of law and of fact separately, at the request of the plaintiff. It found that the relators fully paid for the stock, and were entitled to the certificates, but held that their remedy was in equity, and for that reason refused the writ; and it is claimed here that in so holding, the court committed an error.

The cases are in conflict whether the remedy by mandamus may be employed to compel the issue or transfer of certificates of stock of a private corporation. The remedy in this state is controlled by statutory regulations, which define the writ and determine the cases in which it will issue. "Mandamus is a writ issued in the name of the state, to an inferior tribunal, a corporation, board or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, a trust or station." Rev. Stat., § 6741. A limitation upon the remedy is contained in section 6744, which provides "that the writ must be issued in a case where there is a plain and adequate remedy in the ordinary course of law." The duty of issuing certificates of stock of a private corporation to those entitled to receive them is specially enjoined upon its officers, it is claimed, by the following provision contained in section 3254 of the Revised Statutes, viz.—"Stockholders shall be entitled to receive certificates of their paid up stock in the company, and the president and secretary of the company shall upon demand, execute and deliver to a stockholder a certificate showing the true amount of the

stock held by him in the company." And we think that there can be no doubt that the corporation is bound, through its proper officers to issue, to each stock subscriber who has fully paid for his stock, a certificate truly representing his interest in the corporation.

But the question still remains what is the appropriate remedy for the refusal or failure to do so? If there be a "plain and adequate remedy in the ordinary course of the law", the courts are prohibited by statute from issuing the writ. Shares of stock in a private corporation are personal property; and it has long been settled that an action for damages for their conversion may be maintained upon the refusal, on demand, to issue or transfer certificates to persons entitled to them. True there has not always been uniformity in the rule applied in determining the measure of the damages in such cases,—it being held in some that the value of the stock at the time of the conversion is the measure of the damages that may be recovered; in others, its value at the time of the trial; and in still others, its highest value at any time between the time of the conversion and the time of the trial. The first of these rules above stated is the one which seems generally to prevail, unless there is something in the nature or circumstances of the conversion to enhance the damages. But the damages are not necessarily limited to the market value of the stock. Its actual value may be recovered and that may be shown by proof of the value of the property and business of the corporation, its good will and dividend earning capacity. *Freon v. Carriage Company*, 42 Ohio St. 38; *Cook Stocks & S.*, § 581. Besides "remedy in the ordinary course of the law" is not confined to those actions which, before the adoption of the civil code, were actions at law, but embraces suits in equity as well; and if, for any reason, an action for damages might prove inadequate for the full redress of the relator's injury, we see no reason why they could not obtain that full measure of relief in equity. It was held by this court in *Railroad Company v. Fink*, 41 Ohio St. 321, that a suit in equity may be maintained against a corporation to compel it to issue a stock certificate to a subscriber or assignee upon a tender of the sum subscribed. Indeed, that remedy is well established, and is the one generally pursued in such cases, and also in cases where the transfer of stock on the books of the corporation, or a certificate of such transfer, is sought. *Cook, Stocks & S.*, §§ 61, 391. In the last section cited, that author says that the remedy by suit in equity is the most complete and most just one for compelling a corporation to register a transfer of stock, and is a remedy applicable to almost all cases arising under a refusal of a corporation to allow a registry of a transfer. The case will be decided on equitable principles, however, and a transfer will not be decreed if it involves bad faith. The relief usually demanded is in the alternative, being either for a registry of the transfer or damages in lieu thereof." The reasons which

conduce to the holding that a suit in equity is the most satisfactory and complete remedy to accomplish the registration of transfers of stock apply equally when the object sought is the issue of certificates originally. Mandamus is not well adapted to the trial of questions of fact or a determination of controversies of a purely private nature. Its office is rather to command and enforce the performance of those duties in which the public have some concern, and where the right is clear, and does not depend upon a complication of disputed facts which must be settled from the conflicting testimony of witnesses. There is nothing in the facts of the case before us which show that an action for damages, or suit in equity, would not furnish the relators a plain and adequate remedy for the wrong complained of. It is not alleged that the corporation has refused to admit them as members of that body, or denied them the right to vote or be voted for, or to exercise their privileges as stockholders, nor that any of their personal advantages or privileges as such have been interfered with. The writ of mandamus has sometimes been granted to compel the admission of members in corporate bodies when essential to the preservation of personal advantages to which they show themselves to be clearly entitled. The petition alleges in general terms that the relators "have no remedy at law"; but that amounts to no more than a declaration of the pleader's opinion, and as an allegation of fact, is without force. Our conclusion is that where the officers of a private corporation organized for profit refuse, upon demand, to issue a certificate of stock to a person entitled thereto, his appropriate remedy is by action against the corporation for damages, or in equity to enforce the issue and delivery of the certificate. If, for any reason, the one does not, the other will, afford him a plain and adequate remedy, and he may resort to either at his election. Mandamus cannot, therefore, be properly invoked. Judgment affirmed.

In accord:—*Freon v. Carriage Co.*, 42 Oh. St. 30; *Kimball v. Union Water Co.*, 44 Cal. 173; *Stackpole v. Seymour*, 127 Mass. 104; *Murray v. Stevens*, 110 Mass. 95; *Rex v. Bank of England*, 2 Doug. 524; *Birmingham Fire Insurance Company v. Commissioners*, 92 Pa. St. 72; *Shipley v. Mechanics Bank*, 10 Johns. (N. Y.) 484; *State v. People's Building and Loan Association, etc.*, 43 N. J. L. 389; *Baker v. Marshall*, 15 Minn. 177; *Tobey v. Hakes*, 54 Conn. 274.

But in the case of quasi-public corporations or public service companies vested with the power of eminent domain the writ has been granted on the theory that the duty to issue or transfer such stock was a public or quasi-public duty. *Reg. v. Lambourn Valley Railroad Company*, 22 Q. B. D. 463.

Where title of stock has come from purchase at a judicial sale thereof, the vendee has been held entitled to the writ to compel a transfer of the stock on the books of the corporation. *People v. Goss Manufacturing Company*, 99 Ill. 355; *Hair v. Burnell*, 106 F. 280; *Bailey v. Strohecker*, 38 Ga. 259.

Section 6.—The Parties.

WHILE the remedy by *Mandamus* may be invoked for the purpose of enforcing either a purely private right, unconnected with a public interest, or a purely public right, where the people at large are the real party in interest, in modern practice it is more frequently called into requisition for the former purpose than for the latter, although the fiction and theory of a public interest involved is often retained even in cases where the real object is solely the protection of private interests and the enforcement of private rights. In both cases, however, the proceedings are instituted usually in the name of the People or the State upon the relation of the party who has been aggrieved. It is difficult, to say the least, to perceive any satisfactory reason why such proceedings should not be conducted, as in all ordinary actions which have for their object the protection and security of private rights, in the name of the real party in interest, both as plaintiff and defendant, without adhering to the purely formal practice of introducing the State or People as prosecutor. Especially is this true in those states where there has been such a pronounced attempt to "simplify" the matter of pleading by means of the code. This method of instituting the proceedings in the name of the State is, however, of very ancient origin and doubtless has its foundation in the principle formerly underlying the issue of the writ, whereby the writ of *Mandamus* was not regarded as a writ of right but purely a prerogative writ, issuable only at the will and pleasure of the Sovereign, and therefore issued only in his name. The tendency of modern practice is to disregard the prerogative feature of the writ and to treat it as an ordinary writ of right, issuable as of course, upon proper cause duly shown. Some of the states, however, still adhere to the prerogative features of the writ, especially where the same is sought by the State Attorney as against some public office or officer. There is a pronounced tendency to regard the use of the name of the Sovereign, as prosecutor, as merely nominal, and the remedy essentially as a civil remedy.

"In this country a *mandamus* cannot in any strict sense be termed a prerogative writ, and much confusion of ideas has resulted from the efforts of many courts to attach prerogative features to the remedy, as used in the United States. This confusion has resulted chiefly from a failure to properly discriminate between the English and American systems. Under the English constitution, the king is the fountain and source of justice, and when the law did not afford a remedy by the regular forms of proceedings, the prerogative powers of the sovereign were invoked in aid of the ordinary judicial powers of the courts, and the *mandamus* was issued in the king's name, and by the court of king's-bench only, as having a general

supervisory power over all inferior tribunals and officers. Originally, too, the king sat in his own court in person and aided in the administration of justice; and although he has long since ceased to sit there in person, yet by a fiction of law he is still so far presumed to be present as to enable the court to exercise its prerogative powers in the name and by the authority of the sovereign. And the fact that a mandamus was formerly allowed only in cases affecting the sovereign, or the interests of the public at large, lent additional weight to the prerogative theory of the writ." High Ex. Leg. Rem., § 3.

I. Plaintiff.

STATE EX REL. HUSTON ET AL. V. COMMISSIONERS OF
PERRY COUNTY.

1856. SUPREME COURT OF OHIO. 5 Ohio St. 497.

(MANDAMUS to compel completion of county buildings.)

SCOTT, J. A question has been made in this case, whether the proper parties are before the court. The respondents claim that the State of Ohio is not a proper party, and that the relators have not such an interest in the subject matter as will entitle them to the remedy which they seek. The 570th section of the code provides that the "writ may issue on the information of the party beneficially interested," and we think the facts stated in the information show such a beneficial interest in the relators as should entitle them to relief. The subject-matter of the complaint is the refusal by the public officers to perform a duty imposed on them by law, and in a case like the present, it must be difficult to point out any mode of attaining adequate redress, if the performance of that duty cannot be enforced by mandamus.

The question as to the prosecution of the writ in the name of the state, is purely technical; and if this mode of prosecution be informal under the code, leave would of course be given to amend. But we incline to think this mode of proceeding in mandamus proper. The writ is, from its very nature and definition, "a command issuing in the name of the sovereign authority." Bouvier's Dict. Blackstone says, "It is a command issuing in the king's name." In the United States it has always been issued in the name of the sovereignty by which it was authorized. We apprehend the code does not contemplate an essential change in the character of the writ or the proceedings under it. From the nature of the remedy, this suit, then, is properly prosecuted in the name of the state. * * *

STATE EX REL. WEAR V. FRANCIS.

1888. SUPREME COURT OF MISSOURI. 95 Mo. 44.

SHERWOOD, J. (Omitting part of the opinion.)

I. Before going into the merits of the case, however, a preliminary question must first be determined; it is this, whether the relators, being merely private citizens, are proper parties to this proceeding. In *State ex rel. v. Hoblitzelle*, 85 Mo. 620, it was ruled that the relator being a contestant for an office, had a right to have an inspection of the poll-books relating to his election. But in the minority opinion it was declared that, where a public right is involved, and the object is to enforce a public duty, the people are regarded as the real party, and in such case the relator need not show any legal or special interest in the result, the fact that he is a citizen, and, as such, interested in the execution of the laws is the sesame which unlocks the gates of mandatory authority whenever an officer whose duties are merely ministerial, refuses to perform his office and thereby causes detriment to the public interest. In the subsequent case of *State ex rel. v. Railroad*, 86 Mo. 13, the position of the minority was fully endorsed, some of the same authorities being cited in its support. The great weight of judicial decision supports this view. This point must, therefore, be ruled in favor of the relators. * * *

STATE EX REL. TAYLOR ET AL. V. MOUNT ET AL.

1898. SUPREME COURT OF INDIANA. 151 Ind. 679, 51 N. E. 417.

HOWARD, J. This was an action brought by the relators, in the name of the state, for a writ of mandamus to require the appellees, who constitute the state board of election commissioners, to place upon the official ballot to be voted at the general election to be held in November, 1898, the names of the relators as candidates for judges of the appellate court. In the complaint and alternative writ issued thereunder it is shown that the relators are each eligible to the office of appellate judge, that each was duly nominated thereto, and said nomination properly certified to the said board of election commissioners, but that said board refused to place the names of relators upon the official ballot, claiming that there was no such officers to be elected at said election. To the complaint and alternative writ the appellees demurred for want of sufficient facts, and this demurrer was sustained by the court. Judgment was thereupon rendered denying the peremptory writ, and for costs against the relators.

As preliminary to a consideration of the case upon its merits, the appellees contend that the complaint is defective, for the reason that it discloses a joint action by the relators, whereas they have no joint or common interest in the result. There is no doubt that each of the relators is separately interested in the outcome of the action, inasmuch as each seeks election for himself to the office of judge of the appellate court. We think, however, that they have also a common interest in the decision of the case. They are all complaining of the one act of the election commissioners, who have refused to place their names on the official ballot, claiming that there is no right to fill the office of appellate judge at the ensuing general election. That is the one actual, indivisible issue brought before the court, and each of the relators is equally interested in the decision of that issue. The separate interests of the relators, which follow and depend upon the determination of this issue, are merely incidental, and are not before the court for any decision whatever. Is there a vacancy in the office of appellate judge, to be filled at the ensuing election, and should the election commissioners therefore place the names of the relators on the ballot as candidates for that office? That is the question for decision, and it is too plain for argument that all of the relators, nominees as they are for this office, have a common interest in the decision of this question. They ask only that the court answer the question by saying "Yes" or "No", and in this answer they all have a common interest. * * *

Proceedings in name of state.—*Price v. Harned*, 1 Iowa, 473; *Contra*: *State v. Faulkner*, 20 Kan. 541; *Stoddard v. Benton*, 6 Colo. 508; *Morris v. Womble*, 30 La. Ann. 1312; See also *Northern Pac. R. R. Co. v. Washington Territory*, 142 U. S. 492; *State v. Carey*, 2 N. D. 36; *Howard v. City of Huron*, 5 S. D. 539; *Whitesides v. Stuart*, 91 Tenn. 710.

Interest of relator.—*Linden v. Allameda Co. Supervisors*, 45 Cal. 6; *Contra*: *Moses v. Kearney*, 31 Ark. 261. See also *Union Pac. R. R. Co. v. Hall*, 91 U. S. 343.

Joinder of parties.—*State v. Mayor*, 43 La. Ann. 92; *State v. McIver*, 2 S. Car. 25; But see *Wright v. Gallatin Co. Commissioners*, 6 Mont. 29.

Intervention of third parties is usually permitted.—*State v. Pillsbury*, 31 La. Ann. 1; *Lord v. Bates*, 48 S. Car. 95; *First National Bank v. Lancaster*, 54 Neb. 467; But see *State v. Burkhardt*, 59 Mo. 75.

2. Defendant.

THE PEOPLE EX REL. COMMISSIONERS v. THE COMMON COUNCIL OF THE CITY OF NEW YORK.

1866. NEW YORK COURT OF APPEALS. 3 Keyes (N. Y.) 81.

(PETITION for a mandamus to compel the common council to enact an ordinance for the creation of a fund for building a public market as directed by statute. Objected that common council owed no duty to the relators, that duty to create said fund was imposed upon the municipality.)

WRIGHT, J.—(Omitting part of the opinion.)

2. As to the objection that the common council owe no duty to the relator. It is based on the ground that the statute, in language, imposes the duty to create the stock upon “the mayor, aldermen, and commonalty of the city of New York”, that is, the municipal corporation, and not upon the common council. This objection is equally groundless, with that which has been considered. The rule is well established that the writ lies to the person or the body whose legal duty it is to perform the required act; as where a corporation is required by law to do a particular act, the mandamus is addressed to that organ of the corporation which is to perform it. In the language of some of the cases, the writ lies against the body upon whom the duty of “putting the necessary machinery in motion” is imposed. The common council is the only organ of the corporation of the city of New York, which can create the stock under the statute. It must be done by an ordinance, and that can only be enacted by the legislative department, viz., the common council.

The order of the supreme court should be affirmed.

All the judges concurring.

Order affirmed.

PRESCOTT v. GONSER, AUDITOR.

1872. SUPREME COURT OF IOWA. 34 Iowa 175.

(MANDAMUS to compel auditor to affix county seal to certain warrants issued by his predecessor in office.)

MILLER, J. I. The first and second grounds of demurrer are to the effect, that the petition does not state sufficient facts to constitute a cause of action in this, that it is not alleged that the defendant was clerk of the board of supervisors at the time of the issuance of the warrants set out in the petition, or that the board ever directed this defendant to seal the warrants.

The position contended for in the argument is, that the defendant is not in law authorized or required to affix the county seal to warrants issued by his predecessor in office, unless specially directed to do so by the board of supervisors.

In this position we do not concur.

The county, whose officer the defendant is, is a corporation for political purposes (Rev., § 221), and as such is clothed with the attribute of perpetual succession, as long as the corporation shall have an existence. It is the same person in law today as when the warrants were issued; in like manner as the great "Father of Waters" is still the same river, though the parts which compose it are ever, and will continue to be, while its majestic stream shall pursue its course to the sea, changing every instant of time. See 1 Blackstone Comm., marg. p. 468; Angell & Ames on Corp., § 8. So a corporation, which is composed of its numerous members, and is, and can be, represented only by its officers and agents, who are continually changing, is, during its entire existence, but one person in law. *Id.* And where the action, as in this case, is brought against the officer of the corporation, upon whom the law devolves a specific duty, which, it is alleged, he has omitted and refuses to perform, the same doctrine of immortality, so to speak, is to be applied. The action is brought against the officer as such, and not against the person; for it is only in his official capacity that he can perform the duty; and the act sought to be enforced is to be done by the officer who at the time sustains that relation. If, therefore, a duty which is specially enjoined upon an officer is neglected or omitted by him, his successors may be required to perform it, if it can still be done. *United States ex rel. v. Commissioners of Dubuque County, Morris (Iowa)*, marg. p. 31. * * *

GAAL v. TOWNSEND ET AL.

1890. SUPREME COURT OF TEXAS. 77 Tex. 464, 14 S. W. 365.

GAINES, J. At the general election held in November, 1888, the appellant was elected one of the commissioners of El Paso county, and, having duly qualified as such, entered upon the duties of his office. In April, 1889, he also accepted the office of Mayor of the town of Ysleta. Appellee Townsend was at the time the county judge of the county, and treating appellant's office of commissioner as having been vacated by the acceptance of the office of Mayor of Ysleta, proceeded to appoint his co-appellate Schutz to fill the vacancy. Schutz was thereupon inducted into the office. This action was brought against appellant by the appellees in order to procure a writ of mandamus to compel Townsend, as county judge, to permit

the appellant to perform his duties as county commissioner of El Paso county. The petition, among other things, alleged the facts above stated, but did not make the other members of the commissioners' court parties to the suit. There was a demurrer to the petition for the want of proper parties, which the court sustained. All other demurrers were overruled. The plaintiff having declined to amend, his suit was dismissed.

We are of the opinion that the court did not err in its ruling. We think it is a general rule that, when the performance of a duty is sought, to be compelled by the writ of mandamus, all persons charged with the performance of that duty must be made parties defendant in the writ. The duty here sought to be enforced is to permit the appellant to sit and act as a member of the commissioners' court. It is one which is incumbent upon every member of that court, and can be exercised only through the will of a majority of their body. How, then, can the performance of this duty be compelled by a suit against one alone? The other members of the court, not being parties to the writ, could not be affected by any judgment that might be rendered, and could not be held in contempt for refusing to admit the plaintiff to act as a member, although this court should in this suit declare him entitled to the office, and command the defendant Townsend to admit him as such. It is clear that a mandamus should not issue to compel the county judge to do an act which could only be performed with the consent of others. The mere fact that the act of the county judge in treating appellant's office as vacant and in appointing his successor may have led to the action of the commissioners' court in excluding the appellant from the duties of his office can make no difference. In a proceeding by mandamus to compel a body of persons to perform an act, all whose duty and privilege it may be to participate in the performance of that act must be made parties defendant.

In *Lyon v. Rice*, 41 Conn., 245, it was the duty of three selectmen of the town to call a town meeting upon the application of 20 freeholders. A proper application was presented, and two of the selectmen refused to join the third in calling the meeting. In an application for a mandamus it was held that the selectman who was willing to call the meeting was a necessary party. In view of the fact that the disposition of the case in the court below and in this court does not preclude the appellant from bringing another suit, we deem it proper to express an opinion upon another question discussed in the brief. Whether appellant vacated his office or not by accepting the office of mayor of Ysleta depends upon the proper construction of section 40 of article 16 of the present constitution. That section is as follows: "No person shall hold or exercise at the same time more than one civil office of emolument, except the justice of the peace, county commissioner, notary public, and postmaster, unless other-

wise specially provided." Does this mean that an incumbent can hold either of the offices named, and at the same time any other office, and that he can hold only two offices when both are among those specially designated? We think the former is the proper construction. The language is copied mainly from section 26 of article 7 of the constitutions of 1845, of 1861, and of 1866, which is the same in each of those instruments, and reads as follows: "No person shall hold or exercise at the same time more than one civil office of emolument, except that of justice of the peace." It is clear that under this section any justice of the peace might hold another office. *Powell v. Wilson*, 16 Tex. 59. The office of justice of the peace was made an exception to the general rule, and the inference from the use of the same language in the present constitution, with the mere addition of other offices, is strong that it was not meant in any manner to change the general rule, but merely to make additional exceptions. The other construction would materially modify the general effect of the provision. It would prevent even a justice of the peace from holding any other office except one of those specially named, and would be a radical departure from the provisions of all previous constitutions on the same subject. Const. 1869, art. 3, § 30. If the language of the provision in question had been "except those of justice of the peace", etc., there may have been more doubt about the construction; but the words are "except that", etc., and they indicate that it was intended that a person might lawfully hold any office, and in addition either of the offices enumerated. The use of the word "those" would have suggested the construction that an incumbent could only lawfully hold two offices at the same time, when both were offices specially named in the section. If the allegations of the petition are true, we are clearly of the opinion that the appellant did not vacate his office of county commissioner by accepting that of mayor. Such we understand to have been the ruling of the court below. But, because the appellant did not make all members of the commissioners' court parties to the suit, the judgment is affirmed.

Municipal corporations.—*Mayor v. Lord*, 9 Wall. (U. S.) 409; *Savage v. Sterberg*, 19 Wash. 679; *Wren v. Indianapolis*, 96 Ind. 206; See also *Williams v. City of New Haven*, 68 Conn. 263.

To successor in office.—*State v. Canfield*, 40 Fla. 36; *Norwalk, etc., Light Co. v. Common Council, etc.*, 71 Conn. 381; See also *Mason v. School District*, 20 Vt. 487.

Joinder of parties respondent.—*State v. Cavanac*, 30 La. Ann. 237; *Hooper v. Farmen*, 85 Md. 587; *State v. Board*, 7 Wyo. 478; *Littlefield v. Newell*, 85 Me. 246; *State v. Brown*, 19 Wash. 383; And see *People v. Wendell*, 10 N. Y. S. 587; *Cross v. West Va. & R. Co.*, 35 W. Va. 174; *State v. Smith*, 7 S. Car. 275; *Labette Co. Commissioners v. U. S.*, 112 U. S. 217.

Section 7.—Pleading, Practice and Procedure.**I. Statute of Anne.**

Prior to the enactment of this statute (1710), the strictest rules of common law pleading applied to the proceedings in Mandamus. The determination of the cause was based entirely upon the return to the alternative writ and this return was incontrovertible. Until the enactment of the statute the relator had no remedy as against the defendant for a false return save in an action on the case. Since the statute, the pleadings in mandamus have been made to correspond very closely to the pleadings in ordinary actions. The relator having by petition or otherwise presented his right of action, the alternative writ issues, (or sometimes in its stead a rule to show cause), and this operates to all intents as the declaration in the cause. The first pleading in mandamus is properly the alternative writ.

The essential provisions of the Statute of Anne have been recognized either by legislative enactment or judicial interpretation in practically all the States. Where the Code has been adopted it has, of course, been found necessary to make important modifications in order to harmonize the pleadings in Mandamus with those in other actions at law. In this respect the pleading and practice acts of the several states must be consulted.

STATUTE OF ANNE.**9 Anne, Ch. 20. (1710.)**

1. Whereas divers persons have of late illegally intruded themselves into, and have taken upon themselves to execute, the offices of mayor, bailiffs, portreeves, and other offices, within cities, towns corporate, boroughs and places within that part of Great Britain called England and Wales; and where such offices were annual offices, it hath been found very difficult, if not impracticable, by the laws now in being, to bring to a trial and determination the right of such persons to the said offices within the compass of the year; and where such offices were not annual offices it hath been found difficult to try and determine the right of such persons to such offices, before they have done divers acts in their said offices prejudicial to the peace, order, and good government within such cities, towns corporate, boroughs and places, wherein they have respectively acted; and whereas divers persons, who have a right to such offices, towns corporate, boroughs and places, have either been illegally turned out of the same, or have been refused to be admitted thereto, having in many of the said cases no other remedy to procure themselves to be respectively admitted or restored to their said offices or franchises of being burgesses or free-men than by writs of mandamus, the proceedings on which are very dilatory and expensive, whereby great mischiefs have already ensued, and more are likely to ensue, if not timely prevented; for remedy whereof, be it enacted by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and

after the first day of the Trinity Term, in the year of our Lord one thousand seven hundred and eleven, where any writ of mandamus shall issue out of the court of queen's bench, the courts of sessions of counties palatine, or out of any of the courts of grand sessions in Wales, in any of the cases aforesaid, such person or persons, who by the laws of this realm are required to make a return to such writ of mandamus, shall make his or their return to the first writ of mandamus.

II. And be it further enacted by the authority aforesaid, that from and after the said first day of Trinity term, as often as in any of the cases aforesaid any writ of mandamus shall issue out of any of said courts, and a return shall be made thereunto, it shall and may be lawful to and for the person or persons suing or prosecuting such writ of mandamus, to plead to or traverse all or any of the material facts contained within the said return; to which the person or persons making such return shall reply, take issue or demur; and such further proceedings, and in such manner, shall be had therein, for the determination thereof, as might have been had if the person or persons suing such writ had brought his or their action on the case for a false return; and if any issue shall be joined on such proceedings, the person or persons suing such writ shall and may try the same in such place as an issue joined in such action on the case should or might have been tried; and in case a verdict shall be found for the person or persons suing such writ, or judgment given for him or them upon a demurrer, or by *nil dicit*, or for want of a replication or other pleading, he or they shall recover his or their damage and costs in such manner as he or they might have done in such action on the case, as aforesaid; such costs and damages to be levied by *capias ad satisfaciendum*, *feri facias*, or *elegit*; and a peremptory writ of mandamus shall be granted without delay, for him or them for whom judgment shall be given, as might have been, if such return had been adjudged insufficient; and in case judgment shall be given for the person or persons making such return to such writ, he or they shall recover his or their costs of suit to be levied in manner aforesaid.

III. Provided always, that if any damage shall be recovered by virtue of this act against any such person or persons making such return to such writ, as aforesaid, he or they shall not be liable to be sued in any other action or suit for the making of such return; any law, usage or custom to the contrary thereof in anywise notwithstanding.

2. The Petition.

This is invariably in the nature of an *ex parte* application to the court and the general essentials of good pleading are required. The petition should make out a *prima facie* case; should state all the facts necessary to justify the relief sought; should set forth these facts with a degree of ordinary certainty, and, under circumstances, allege facts sufficient to prove jurisdiction; should allege the absence of another adequate remedy; and where the performance of the duty sought to be enforced is dependent upon conditions precedent, the performance of such obligations should be specifically alleged, or an adequate excuse for non-performance definitely stated.

3. The Alternative Writ.

In conformity with the Statute of Anne, the alternative writ is looked upon in most states as the first formal pleading of the relator. The petition and affidavits upon which the writ was obtained are technically considered no part of the record, nor can they be used to support or supplement the allegations in the alternative writ.

This alternative writ must contain, specifically stated, all the averments of fact upon which the relator bases his right of action, thus enabling the respondent to have information sufficient to permit him to make a full and complete answer to such averments. Originally the highest degree of technical particularity was required in the alternative writ and subsequent pleadings, but under the modern practice a "certainty to a common intent" is considered sufficient to answer all requirements. This does not mean, however, that any degree of laxity is justifiable in this (or any other) pleading. The alternative writ must contain every material fact upon which the relator bases his claim for relief, and these facts must be set forth distinctly, unreservedly, fully and clearly, since no deficiency in the allegations contained in the alternative writ can be supplied by matter appearing in the petition and its accompanying affidavits or in the return. The relator must stand or fall with his alternative writ.

After the facts have been stated in the alternative writ, a mandatory clause should be added and this must particularly and specifically set forth the duty required of the respondent, asking the court for an order compelling him to perform such duty. The greatest care should be exercised in framing this mandatory clause since the final or peremptory writ must strictly conform therewith and be enforced in its terms or fail.

4. The Return.

The return of the respondent to the alternative writ corresponds in most essentials to the plea or answer of the defendant in an ordinary civil action. Originally the return not being traversable, the utmost degree of certainty, "certainty to a certain intent," was required of the respondent. In modern practice the severity of this rule has been greatly relaxed. The return must either show obedience to the mandatory clause of the alternative writ, or cause for not obeying same.

5. Objections to the sufficiency of the alternative writ.

Owing to the summary nature of the proceeding in *Mandamus* at common law, a demurrer to the alternative writ was unknown. The respondent, however, could always test the sufficiency of the writ either by a motion to quash or by a motion to discharge the rule to show cause; this practically answered the purpose of a general demurrer. Under the modern practice acts a demurrer is usually allowed and respondent now may either demur or take issue.

Technically the respondent's return is the final pleading, but there appears no reason why, in a proper case, relator might not file a "replication", explaining or avoiding facts set up in the return.

COMMERCIAL BANK OF ALBANY v. CANAL COMMISSIONERS OF THE STATE OF NEW YORK.

1832. COURT FOR THE CORRECTION OF ERRORS OF NEW YORK. 10 Wend. (N. Y.) 26.

THE following opinion was delivered by the chancellor.

An objection was raised on the argument of this cause, to the affidavits and other papers of the relators on which the order for the mandamus was granted, as forming no part of the record in the court below. On the suggestion of one of the members of this court, and to prevent delay, the counsel for the defendants in error consented to waive the objection that these affidavits were not in fact incorporated into the record, reserving, however, the right to insist that they could not legally have been made a part of the record, and that the record was properly made up without incorporating them therein. On a careful examination of this question, I am satisfied these affidavits, etc., formed no part of the record, and could not legally have been taken into consideration by the supreme court in deciding this demurrer to the return of the defendants to the peremptory mandamus. We must, therefore, lay them entirely out of the question here.

Some difficulty has occasionally arisen from confounding an alternative mandamus with an order to show cause in the nature of an alternative mandamus. Such a mistake arose in the case of the *People v. The Delaware Common Pleas*, 2 Wend. (N. Y.) 255. The modern practice is not to award a mandamus in the first instance; but to grant an order to show cause why a mandamus should not issue. In such cases the question is discussed upon the original papers on which the order was obtained and upon the opposing affidavits. If there is no dispute about the facts, and neither party

wishes the case to be put in a position to enable him to review the decision upon a writ of error, the court denies the application, or may award a peremptory mandamus in the first instance; in which case no formal judgment is given, and no record is made up in the supreme court. A writ of error is by statute given upon a decision of that kind in the particular case of a contest between the state and individuals relative to water privileges on the canal. 1 Rev. Stat. 235, § 97. In other case, however, if the facts on which the claims of the relator depends are in dispute, or the parties wish to bring the case before the courts of *dernier ressort*, the supreme court awards an alternative mandamus, in which writ the relator sets forth his title, or the facts on which he claims the right to the relief sought by his application, and the defendant is required to do the particular act, or show why he has not done it. If the writ is defective, either in form or substance, the defendant may move to quash it. The King v. The Bishop of Oxford, 7 East (K. B.) 245; The People v. The Judges of Westchester, 4 Cow. (N. Y.) 73. If the writ is not quashed, the defendant must make a return thereto, unless he thinks proper to put an end to the controversy by doing the act required. If he makes a return he must either deny the facts stated in the writ on which the claim of the relator is founded, or he must state other facts, sufficient in law to defeat the relator's claim. Rex v. Corporation of Dublin, Batt. (K. B.) 628. In the case of the King v. The Mayor of York, 5 T. R. (K. B.) 74, Lord Kenyon and Justice Buller said it was too late to take any objection to the writ, after a return thereto. But in this they were clearly wrong, if they intended to apply their remarks to defects of substance. All the authorities, both before and since that decision, show that any defect in substance in the writ, as a want of sufficient title in the relator to the relief sought, may be taken advantage of at any time before the peremptory mandamus is awarded. In the case of the King v. The City of Chester, Holt (K. B.) 438, the court considered the return insufficient and contradictory; but they quashed the writ because that was bad also. In Rex v. College of Physicians, 5 Burr. (K. B.) 2740, after a return had been made to the writ, the mandamus was quashed because the foundation to the relator's claim, or private statute, was not sufficiently set forth therein. The relators in that case afterwards applied for and obtained another writ in which the foundation of their claim was stated *in extenso*, and upon a return of this last writ the case was finally decided. So in the recent case of the King v. Margate Pier Company, 3 Barn. & Ald. (K. B.) 221, the counsel for the relator admitted that the relator's title was not set out with sufficient certainty in the writ, but as a return thereto had been made, he insisted that the objection came too late. He relied also upon the authority of the King v. Mayor of York, to sustain that position. But Abbot, Ch. J., decided it was not too late to take an objection to

the writ; that if the material facts on which the relator founded his claim were not stated in the writ it would deprive the defendant of the power of traversing them; for the defendants were only to answer what was alleged in the writ.

Previous to the statute of 9 Anne, ch. 20, for rendering proceeding on writs of mandamus, etc., more effectual, 1 Evans' statute, 176, the defendant was holden to great strictness in his return to the writ, as the relator had no remedy but by a suit for a false return. Such is now the law in England in cases not coming within the statute. Our statute is general, and gives the same remedy, by traverse, plea or demurrer to the return to an alternative mandamus, in all cases. After the passing of the statute of Anne, the proceedings in cases coming within its provisions assumed the form of ordinary suits. The mandamus set out the grounds of the claim of the relator to the relief sought, and answered to the declaration in other suits. To this the defendant made a return, either traversing the facts there stated, or admitting those facts and setting up new matter in avoidance. To the return the relator either demurred, took issue thereon, or pleaded other matters in answer, as in ordinary suits. 3 Blackstone Comm. 265.

The return to the alternative mandamus in this case is objectionable, in form at least, in not charging facts positively and distinctly; in this respect it is very informal and defective; instead of stating facts, the return merely sets out or refers to matters of evidence, from which those facts are inferred. This is contrary to every principle of good pleading and if the writ in this case had shown a valid right in the relators, I should think the demurrer to the return well taken. But here another well settled principle of pleading applies to the case under consideration. Although the particular pleading demurred to is bad, either in form or substance, yet if some previous pleading is defective in substance, judgment must be given against the party who has committed the first fault. Upon referring to the mandamus, as set out in the record, it shows no right in the relators to the money which the writ commands these defendants to pay. Perhaps it was sufficient in this case, in the writ, to refer to the order and assignment annexed to the affidavits on file, to ascertain what the defendants were required to pay; but the fact showing why they ought to pay that sum, should appear in the writ, clearly and distinctly; so that the facts there alleged might be admitted or traversed. 6 Mod. Rep. (K. B.) 310; 7 East (K. B.) 345; 5 Burr. (K. B.) 2742. It may sometimes be allowable to refer to extrinsic facts to ascertain precisely what is claimed in a suit; but the reasons why it is claimed must always appear upon the record, to enable the court to judge of their validity. As the mandamus was defective in substance, I am satisfied that judgment was properly given to the defendants on demurrer to the return.

The defendants in error have, however, expressed a willingness to waive all questions of mere form, and to have this case decided on its merits, provided they are not to be met with formal objections on the other side; I shall therefore proceed to consider the case upon its merits, on the facts as they appear from the affidavits and papers upon both sides, and as upon an order to show cause why a mandamus should not be granted. It was in this manner, as I understand from the opinion annexed to the case, that the cause was examined and decided in the supreme court.

The chancellor then proceeded to examine the case on its merits, and came to the conclusion that the judgment of the supreme court ought to be affirmed; and the court, being unanimously of that opinion, it was accordingly affirmed.

COMMONWEALTH EX REL. ARMSTRONG V. COMMISSIONERS OF ALLEGHENY CO.

1860. SUPREME COURT OF PENNSYLVANIA. 37 Pa. St. 277.

THOMPSON, J. Mandamus is a high prerogative and remedial writ, the proper functions of which are the enforcement of duties to the public, by officers and others, who either neglect or refuse to perform them. It follows, therefore, that those to whom it may be appropriately directed, owe some duty to the public, and are under obligation to perform it; and for the enforcement of which there is no other specific legal remedy.

In practice, the party seeking such a remedy presents to the court a *prima facie* case, entitling him to the writ, by way of suggestion. This being in proper form and sufficient in substance, an alternative mandamus may be awarded upon it, reciting the complaint of the relator and his demand for redress, and commanding the party to whom it is directed, either to obey it or return his reasons for not so doing. This alternative is what gives the denomination of "alternative mandamus" to the first writ.

The establishment of a duty and the obligation to perform it, is upon the plaintiff to show, and this is considered as done *prima facie*, when the court awards the writ. The respondent, upon service of it, is bound either to obey, or show that the plaintiff has no right to demand obedience, or that no duty exists which he can be compelled to perform. Whenever this is not accomplished by a demurrer, or by a general traverse of the facts set forth in the writ, it is generally done by matters set forth in the return by way of confession and avoidance. In which case the facts relied on to justify the refusal to obey the mandate of the writ, must be clearly and specifically set

forth with sufficient certainty, and not argumentatively, inferentially, or evasively, so that the court may see at once that such facts, if established or admitted, are sufficient as the alternative for obedience to the writ. Tap. on Man. 347; *et passim*, Commonwealth v. Commissioners of Allegheny County, 8 Cas. (Pa. St.) 218; Commonwealth v. City of Pittsburgh, 10 Cas. (Pa. St.) 496.

In the case at hand, the relator sets forth a title to a bond or certificate of loan of \$1,000, claimed to have been issued by the commissioners of the county of Allegheny, in the name of the county, and avers it to be one of a number issued by that county in payment of subscriptions to stock in the Pittsburgh and Connellsville Railroad Company, which, by certain acts of Assembly, therein referred to, it is also alleged they were authorized to make and pay for in the bonds and certificates referred to, and that the respondents were bound to make provision for the payment of the interest on the same, semi-annually, until the principal should fall due, with a further averment of neglect and refusal so to do. This is in substance the relator's case; and if the respondent cannot in law successfully gainsay his title to the redress demanded, or in some other legal way defeat the remedy invoked, a peremptory mandamus must issue. And as that process is not in this instance adapted to, or intended to effect any purpose but that of enforcing the performance of the alleged duty of making provision for the payment of the interest on the bonds so issued, and as that duty is not divisible, it can only be satisfied by performance to the extent of the duty imposed, which will be by making provision for the payment of interest on the whole amount of the bonds mentioned in the writ, of which the relator is the holder of one, and which, so far as to call for the duty claimed, may stand as the representative of all the rest. The duty and obligation to perform it, if established as to the bond of the relator, establishes at least a *prima facie* case as to all the others issued at the same time, under the same authority, and for the same purposes, and *prima facie* entitled to the same meed of justice. The right of individual holders to demand any portion of the money claimed to be raised, is not determined in this proceeding. The only point is, the question of obligation and duty to provide for the payment of interest as enjoined by law.

The respondents in their turn admit the incorporation of the Pittsburgh and Connellsville Railroad Company, the existence of an Act of Assembly authorizing the county of Allegheny to subscribe to the stock thereof, the actual subscription by the commissioners to the extent of \$750,000 (fifteen thousand shares), and the issuance of bonds or certificates of loan to the company in payment of subscription, but rely on certain defenses, to be noticed hereafter, to relieve them from obedience to the writ. This then is what may be called pleading by way of confession and avoidance; and, so far as this is

the nature of the return they place themselves in this position; that facts thus pleaded, being the presentation of a new case by way of defense, must be averred with certainty, and positively, not argumentatively, inferentially, or evasively. We will now test this return by the requirements of the law in mandamus cases.

The return in one sense is single, although it contains many allegations, to which the relator demurred generally. Everything thereafter that is well and sufficiently pleaded or returned, is admitted by the demurrer. Inferences from facts—arguments and conclusions are not.

With these views deemed necessary to a proper outset in the investigation, we shall notice such portions of the return as have not been passed upon in the cases cited (*supra*); and for convenience I may perhaps denominate the separate averments of the return as pleas which, however, they are only by analogy.

The first matter interposed by the respondents in their return is neither by way of confession and avoidance, nor by general traverse, but may be regarded as a plea to the jurisdiction of the court. We decided in Thomas's case, and again in Hamilton v. Council, that our authority to issue such process as this was not circumscribed by the districts assigned to the courts by the legislature, but that it extended throughout the state, without regard to the district in which the court might be in session at the moment of awarding it. The constitution having imposed no other than the territorial limits of the state as the limit of jurisdiction of the court, although the legislature might well appoint districts in which to hold terms, for the convenience of parties, it is hardly necessary to say, that they possessed no power to impair the efficiency of the court by limitations not imposed by the constitution. But I dismiss this portion of the return as insufficient, as is shown in the decision referred to, and Middleton's case decided at this term.

The next matter contained in the return is that the railroad company did not, within five years after the passage of the Act of 1843, which extended the original period for the commencement of the work, in good faith commence the construction of the road; but by a vote of the stockholders, taken under the provisions of an Act of Assembly on the 15th of March, 1847, abandoned the project of building the road, and directed the surrender of the charter, and that installments paid be refunded to such as might desire the same.

All this portion of the return, the substance of which is given, is obnoxious to the objection of want of certainty in pleading in mandamus proceedings. The facts to show want of "good faith in" commencing the work, should have been set out. Instead of that we have only the respondent's inference from facts not exhibited, that there was bad faith in the particular alleged. This was an inference for the court to draw, from the facts; they cannot draw it from an

inference of the party; and there is nothing else from which to draw it; for the facts constituting want of good faith, if there be such, are not averred. As therefore, it was not well pleaded, it is not admitted by the demurrer. Thomas's case, 8 Cas. (Pa. St.) 218.

So with the other allegations in this portion of the return. Did the vote alluded to carry a resolution to abandon the work, or is that the inference of the respondents only? Was there a direction to surrender the charter only, or was it surrendered in fact? Did the stockholders all or any of them, receive their installments paid in? "Certainty, to a certain intent in general", is all that is required; the meaning of which is that the matter alleged must be certain without reference to supposed facts which do not appear. Tap. on Man. 354; Thomas v. Commissioners, *supra*. But that requirement is wanting here.

The conclusions may be just inferences or not, as a matter of belief, in proportion to our faith in the accuracy of those who make them; but these are not facts from which a court can judicially determine them to be so of themselves, and therefore are not sufficient as a return.

* * * The further averment and charge contained in this division of the return, that the commissioners exercised the power to subscribe under the secret influence and representations of the officers of the company, are insufficient for want of certainty. As this is by way of avoidance of the acts of the commissioners, certainty is necessary to give effect to it. Whether the charge is predicated of opinions, belief, or of facts, is not shown, and is therefore not sufficient.

* * * The next portion of the return avers that if any subscription was made by the commissioners, a single bond was delivered in payment of the whole amount; and that this exhausted the power of the commissioners over the subject, and they could not afterwards substitute smaller ones in lieu of the larger ones.

The averment is hypothetical; that "if any subscription was made". This at once condemns it as a plea. It wants positiveness and certainty. How can a legal inference be drawn from premises not asserted? For the purpose of arriving at definite, legal conclusions, facts are pleaded; none such can be arrived at, from a hypothetical or supposed state of things.

* * * Succeeding this is an allegation, on information and belief, that the bonds issued to the company, so far as they have been sold, were sold below par, and in violation of the Act of April 18th, 1853. This plea wants positiveness and certainty. It is not alleged that the fact is true that they were so sold, nor that the bond of the relator was so sold, nor that the company sold them below par. This, it is true, may be inferred to be what is intended; but this is defective pleading. But if this matter were well pleaded, and held to be ad-

mitted by the demurrer, which I do not; yet as a return, it was carefully considered in Thomas's case, and pronounced insufficient, and we adhere to that opinion, for the reasons there set forth.

The next matter alleged was determined to be insufficiently pleaded in *Hamilton v. Councils of the City of Pittsburgh*, 10 Cas. (Pa. St.) 496. It is in substance, after being stripped of accompanying deprecatory matter, that the bond of the relator and those of the "unnamed" parties for whom he proposes to speak, were not transferred in conformity with the law.

The rule has often been adverted to in this opinion, that facts, the predicate of conclusions, must be set forth, and not conclusions merely. Want of conformity to law in the transfer is here averred. This is evidently a conclusion from facts. Why are not the facts, from which the conclusions are drawn, averred? They either exist, or do not exist. If they exist, they should be averred, so that the court might determine whether the conclusions were just or not; if they do not exist, it is obvious the conclusions are good for nothing. We see that the bonds in form pass by delivery. If any other requisites were essential to transfer them, it should have been stated.

* * * The next averment possesses none of the requisites of a plea or return in mandamus. It is a denial by way of *protestando*, that as the respondents are but as temporary trustees of the people, they do not know whether the relator is a *bona fide* holder of bonds or not, and therefore deny that he is, and pray that he may be holden to strict proof. This is a tender of no issue, in law or fact, and we need not waste time with it.

The next averment is, that the bonds of the other holders were not transferred according to law, and that a large portion of them have been hypothecated, as a security for loans by the company, at less than their par value, and that other large amounts thereof were wrongfully paid out by the president on his own individual indebtedness; and that a still larger portion is yet in the possession of the company, or has been sold at a heavy discount since the failure of the company to pay interest, and of which several matters and things the holders had notice.

Now what bonds were thus transferred and hypothecated? No one can tell. The demurrer does not admit what is not asserted with sufficient certainty so as to be the foundation of judicial action. No court would say how many of those bonds were disposed of as stated, and hence the return is defective on account of its vagueness. If any portion remained in the possession of the company, why did not the county take measures to restrain them, by enjoining the company from negotiating them, and thus save themselves as well as innocent parties from wrong? Good faith would have required this rather than silence and acquiescence, and subsequent repudiation. But in regard to the manner in which the matters in this portion of the return are presented, they are not to be taken

as admitted by the demurrer, for the reason that they are not well and sufficiently pleaded.

The next averment is the pendency of sundry actions in the District Court of the county of Allegheny by the holders of other bonds, in which it is alleged that the county has taken full defense.

This does not touch the relators' case. But if this had been possible, by a sufficient plea, it is a novel way of pleading the pendency of an action or actions, to set out neither the names of the parties, cause of action, nor anything upon which a court might judicially determine the pendency or not, or that the cause of the action was the same. Such looseness is condemned by all rules of practice.

* * * In the next place, it is averred that there is no authority to levy a tax for the payment of the interest by the county. We have already treated of this, and said that the authority to create the debt implies an obligation to pay it, and where no special mode of doing so is provided, it is also implied that it is to be done in the ordinary way—by the levy and collection of taxes. This plea is insufficient.

Again: it is averred that the commissioners cannot in one year exceed one per cent. on the adjudged valuation for county purposes, and that as other proceedings, similar in purpose to the present, are pending to coerce the payment of interest on two millions of dollars or thereabouts; this, with the assessment for ordinary purposes, will greatly exceed the limit of one per cent.—and that they believe that one per cent. will be required to meet the ordinary wants of the county. This plea is uncertain and contingent and is not good. It is not averred that in obedience to any proceedings against them, or otherwise, they have determined upon and directed the levy of a tax to the extent of their authority, but only that they may be called on to do so; and inasmuch as they may be called on to go further than they have authority, they will not consent to assess any tax for the payment of any interest. Had they averred a resolution or a determination to levy to the extent of their authority, quite another question would have been raised. But I will not anticipate it. Nor is the asseveration of belief that one cent on the dollar will be required for ordinary purposes, sufficient. Facts upon which that belief was founded should have been set forth, so that the court might judge whether it was well founded or not.

* * * The matter next following in regard to the discretion of the commissioners in assessing the tax, and their quasi-judicial duties in respect to it, is insufficient, and has been so held in both the cases already decided.

So, too, as to the necessity of a demand for interest before instituting proceedings. The relator sets forth the equivalent of this in charging a refusal to provide for its payment, and the facts to establish it, viz.: the assessment of it by one board of commissioners

in 1857, and its countermand not long thereafter. These facts are not denied by the respondents, but, on the contrary, they are justified by them as done in "obedience to the express wishes of the people." This was predetermined refusal, and, standing in this position always afterwards, of what avail would a demand have been? Acts and declarations amounting to a refusal, and showing that such would have followed a demand, would certainly dispense with, because equivalent to, a demand. The law does not exact the performance of vain things, and it would have been idle enough in the face of such acts to have made a demand. If the commissioners had shown that it would have been effectual, it is not probable that the plaintiff would have taken much by the writ. This point, however, was decided against the respondents in *Hamilton v. Councils*, and we reiterate it here.

* * * The last matter to be determined is the interposition of a principle of law by the respondents. It is in substance that the subscription was made solely in obedience to the legislative mandate, and not enforceable as a contract of the county. And further, that the exercise of the taxing power invoked by the relator is an act of sovereignty resting in the will of the respondents, and cannot be coerced, in short that the commissioners are *imperium in imperio*. But, in the cases so often referred to against the city and county, it has been determined that the duty to assess a tax, is enforceable, and that mandamus is the appropriate remedy; and consequently that the commissioners and councils are not sovereign in this behalf. We are satisfied with those decisions, and with the doctrine "*stare decisis*."

Upon a careful review of the facts of this return and the arguments in support of it, we must adjudge it insufficient. Neither in form nor in substance is it sufficient to prevent a peremptory mandamus from issuing to the respondents, commanding them to make provision, by the assessment of a sufficient tax, to pay the interest on the bonds of the county, issued in payment of stock to the Pittsburgh and Connellsville Railroad Company, amounting to the sum of \$750,000. Judgment must, therefore, be entered upon the demurrer against the respondents, and a peremptory mandamus awarded.

PEOPLE EX REL. CHAMBERLAIN v. CITY OF CHICAGO.

1861. SUPREME COURT OF ILLINOIS. 25 Ill. 402.

MR. JUSTICE WALKER delivered the opinion of the court.

It is objected that an alternative writ of mandamus should not issue, because the petition is not verified or supported by affi-

affidavits. Tapping on Mandamus, 292, lays down the rule that "In matters of right, as for instance, where a mandamus is prayed to restore a man, etc., the court does not require, although it is usually supplied with, an affidavit of the fact; but where the writ is asked upon a supposed failure of duty, then the court requires an affidavit, for such a writ is never granted merely for the asking, some reason must be assigned for it, which is done by the disclosure of a sufficient case upon affidavits." This rule seems to be fully sustained by long and well recognized practice. *Rex v. Cary*, 3 Salk. (K. B.) 230, and cases there cited in support of the rule.

Whilst the strict English rule of supporting the application by separate affidavits, is not regarded essential by our practice, still the petition must contain a statement of all the facts necessary to disclose a case entitling the party to the relief sought, and they must be verified by a jurat, or affidavit in some form. This is the practice as it prevails in this country, and we regard it as reasonable, and well adapted to promote the ends of justice. In this case the petition proceeds for the failure of a duty by the city, and the facts set forth in the petition, even if they are sufficient to make a case, are not verified by a jurat or otherwise, and the writ must therefore be refused.

Writ of mandamus refused.

For other cases on the essentials of the petitions see: *Ex parte Manufacturing Co.*, 103 Ala. 415; *Trustees, etc., v. People*, 121 Ill. 552; *Bishop v. Marks*, 15 La. Ann. 147; *State v. Slavens*, 75 Mo. 508; *State v. Everett*, 52 Mo. 89; *People v. Sullivan Co. Supervisors*, 56 N. Y. 249; *State v. Cardoza*, 5 S. Car. 297; *Cullem v. Latimer*, 4 Tex. 329; *State v. Jennings*, 56 Wis. 113; *State v. Gracy*, 11 Nev. 223; *McLeod v. Scott*, 21 Ore. 94; *Klein v. Supervisors*, 54 Miss. 254.

WILLIAMS v. CITY OF NEW HAVEN.

1896. SUPREME COURT OF ERRORS OF CONNECTICUT. 68 Conn. 263,
36 Atl. 61.

(MANDAMUS against the city of New Haven to compel the abolition of a grade crossing by bridging the tracks, in compliance with a prior order of the court.)

ANDREWS, C. J.—In an application for a mandamus, the alternative writ serves the same purpose as the complaint in an ordinary action, and it must show a *prima facie* case upon which the extraordinary remedy asked for ought to be issued. In the present action the facts alleged in the alternative writ do show such a case, viz., a lawful judgment against the defendants, and their neglect and refusal to comply with that judgment.

The return made to an alternative writ of mandamus stands in the place of an answer in ordinary pleadings, and is insufficient unless it shows a complete legal right to refuse obedience to the command of the alternative writ. "It must state the facts which justify such refusal clearly, specifically and with such sufficient certainty that the court can see at once that such facts, if admitted or established, do furnish a legal alternative for obedience to the writ." *Woodruff v. Railroad Co.*, 59 Conn. 63, 86, 20 Atl. 17; *Brainard v. Staub*, 61 Conn. 570, 24 Atl. 1040; *Moses Mand.* 203; *High Extr. Rem.* § 449. The function of the return is not simply to show what would amount to a *prima facie* right in the respondent in the absence of any allegation to the contrary, but to show a right to refuse obedience to the writ in view of the allegations the writ contains; and, if it does not do this, it is demurrable. The return should, for the purpose of making an issue, set up a positive denial of the facts stated, or should state other facts sufficient to defeat the relator's right. 14 Am. & En. Ency. of Law, 230. This is the rule by which the return before us must be treated. Does it show a legal right to refuse obedience to the command in the alternative writ? We are compelled to say that we think it does not. It is divided into five paragraphs. In none of them does it deny any of the allegations contained in the alternative writ. The matters and things set forth in the first, second, and fifth paragraphs are not alleged as an excuse for an entire non-compliance with the command of the alternative writ, but are addressed to the discretion of the superior court, as a reason why the issuing of the peremptory writ should be delayed for a time. The superior court has, doubtless, a large discretion in respect to the issuing or the non-issuing of a writ of mandamus, and very likely may fix a time prior to which the peremptory writ may not be issued. Whether or not the matter alleged in the above-named three paragraphs of the return are such as would justify the exercise of such a discretion rests entirely with the superior court. That is a question not arising on the demurrer. In passing upon that question, the superior court would not be likely to forget that the city had delayed for some five or six years to perform the judgment set forth in the alternative writ, for which delay no excuse is suggested other than its own convenience.

The matter set forth in the third and fourth paragraphs is somewhat different. It is to the effect that the charter of the city requires the common council, in December of each year, to make appropriations to meet the necessary expenses of the city for the year next ensuing, and forbids all city officers and boards to expend any money, or to incur any liability, in excess of the sums so appropriated; that the common council in December, 1895, made certain appropriations for the expenses of the city for the year then next

following, "and nothing was appropriated by said court of common council for the purpose of constructing a bridge across the said freight branch of the N. Y., N. H., & H. R. R. Co."; that to construct said bridge, it would be necessary for some officer or board to incur a liability or expense in excess of the appropriations, which no officer or board had power under the charter or under the law to do. If these facts are a legal excuse for refusing to obey the command of the alternative writ, they are so because the omission of the common council to provide the means of complying with the judgment of the superior court absolves the city from the legal duty of performing the judgment. Except that these facts are stated with apparent sincerity, and are argued with gravity, this part of the return would almost be deemed ironical; especially when it is presented to the same court which rendered the judgment sought to be enforced. The provisions of the charter of New Haven certainly furnish the rule of conduct for the officers of that city, in the administration of its internal affairs, but that these provisions can furnish any excuse to the city or its officers for not obeying the laws of the state, or the judgment of a competent court, is not to be tolerated for an instant. *Cook v. City of Ansonia*, 66 Conn. 413, 34 Atl. 183.

There is another reason, not stated in the return, but argued in the briefs, which we think it proper to notice. It is that the writ of mandamus should be directed to that officer or board which is specially charged with the performance of the thing ordered to be done. In all these cases where there is such a corporate officer or board, we understand the rule to be as claimed by the city. In the case of *State's Attorney v. Selectmen of Brandford*, 59 Conn. 402, 22 Atl. 336, the selectmen were such a board. In the case of *State v. County Commissioners*, 68 Conn. 16, 35 Atl. 801, the county commissioners were such a board. In the recent case of *State v. Williams*, 68 Conn. 131, 35 Atl. 24, 421, the defendant was a town treasurer, whose duty was expressly pointed out by the statute. By the charter of New Haven, there is no such officer or board; and in such cases the mandamus may be directed to the city in its corporate capacity. *Dillon Mun. Cor.* § 861 b, and note.

The superior court is advised that the return is insufficient, and to sustain the demurrer. The other judges concurred.

STATE EX REL. MOUNTAIN GROVE BANK v. DOUGLAS COUNTY.

1898. SUPREME COURT OF MISSOURI. 148 Mo. 37.

(RELATOR brought suit by mandamus to compel the county court to pay a certain judgment recovered against the county. Relator further charged in the alternative writ that the county had \$3,300

in its treasury, unappropriated and liable to the payment of said judgment. To this respondent returned, setting forth the collection of back taxes for certain years generally and that said county court had set aside and appropriated all the sums so collected for said named years, and that all of said sums were liable for the payment of warrants already issued. Relator demurred to this return and moved for judgment on the ground that said return did not show a legal excuse for disobedience of the writ, in that it did not particularly and specifically set forth the sums collected in back taxes by separate years nor show specifically the sums appropriated in these respective years.)

ROBINSON, J.—

(Omitting part of the opinion) * * * To this return or answer, the relator filed its motion for judgment in the nature of a demurrer to the legal sufficiency thereof, and upon the cause coming on for hearing, on said motion, the court found the issues for the respondent and the relator prosecuted its appeal from said judgment to this court after the usual preliminaries to that end.

Does the return show a legal excuse for refusing obedience to the commands of the alternative writ, is the only question at issue. Though the answer might have been made more definite and specific, and have been more enlightening to the court and satisfying to the relator, when it undertook to classify in part the funds in the hands of the treasurer, and to designate the year in which said funds belonged; and though we do not understand why the county court could not have ascertained what part of the sum of \$2,681.40, collected in the year 1893, as back taxes for the years 1889, 1890, 1891, 1892 and for the current year 1893, and returned by the collector to the treasurer of Douglass county as county revenue, and have stated exactly what part thereof was collected for each of these years designated, still the return does allege that the county court set apart and apportioned all the said sum, so collected, in the hands of the treasurer to the various funds. for county purposes, for the years 1889, 1890, 1891, 1892 and 1893, and that all of said sums were fully covered by and liable for the payment of warrants duly and legally issued by the county court upon the various funds to which it had been appropriated. If the relator was not satisfied with the return, on account of its indefiniteness in that particular, it should have by proper proceedings required the return to be made more specific, or have put it in issue by a denial the allegation of fact thus stated in such general terms. Not having done either, but standing on its motion, in the nature of a demurrer to the return, we think the court acted rightly in finding as it did. The presumption must be indulged, nothing to the contrary appearing, that the county court did its duty properly when it apportioned and appropriated

the money in the hands of the treasurer to the proper funds for the various years designated in the return, although it did say in its return that it did not know what part of the said sum of \$2,681.40 so collected and turned over to the treasurer, was collected as back taxes for any designated year. It may further be said in support of the judgment of the trial court, that the respondents by their return denied generally that there was in the hands of the treasurer of Douglass county any money of said county unappropriated to the payment of any demands against the county and liable and appropriate to the payment of relator's judgment to the amount of \$3,300 or any other sum. As relator has elected to stand on its demurrer so it must abide the consequences of its position. Respondent's return if true, and so it must be treated for the determination of the issues of this case, is a legal excuse for not complying with the command of the alternative writ, and the judgment of the circuit court will be sustained. All concur.

For other cases on the essentials of a proper return see: *People v. Ohio Grove*, 51 Ill. 191; *Hooper v. New*, 85 Md. 565; *May v. Finly*, 91 Tex. 352; *State v. Kellogg*, 95 Wis. 672; *Gorgas v. Blackbur*, 14 Ohio, 252; *Green v. African Methodist, etc., Church*, 1 Serg. & R. (Pa.) 254; *State v. Williams*, 95 Mo. 159; *State v. Morris*, 103 Ind. 161; *Evans v. Thomas*, 32 Kan. 469.

STATE EX REL. SHERMAN v. COMMON COUNCIL OF MILWAUKEE.

1865. SUPREME COURT OF WISCONSIN. 20 Wis. 87.

DOWNER, J.—The defendant moves to discharge and set aside the rule to show cause why a peremptory writ of mandamus should not issue. This motion must be regarded as a demurrer, and the statements of the relator taken as true. * * *

BY THE COURT.—The motion is overruled, and leave given to answer in twenty days.

See also, *People v. Harris*, 6 Abb. Pr. (N. Y.) 30; *State v. Board*, 10 Iowa, 157; *State v. County Court*, 33 W. Va. 589; *State v. Neville*, 157 Mo. 386; *Crans v. Francis*, 24 Kan. 750; *Commonwealth v. Lyndall*, 2 Brews. (Pa.) 425; *Borgstede v. Clarke*, 5 La Ann. 291.

5. Practice in Mandamus Suits.

The practice in Mandamus is so largely affected by the statutory provisions that nought but a few essential features of the prevailing present practice can be noticed here.

At present the general practice is to present to the court an application in the form of a petition or complaint, or affidavits (in a few

states), as a basis for granting the alternative writ. This application is invariably *ex parte*. If such application presents a *prima facie* case the alternative writ issues and same must be duly served on respondent, who, unless he obeys the order therein contained, may either demur, move to quash, or to discharge the rule to show cause or make return. To the return the relator may either demur, move to quash, or proceed to trial on the issues presented.

The practice of issuing a rule to show cause before issuing the alternative writ has gradually disappeared and exists now only in Wisconsin and perhaps a few other states.

Upon trial of the issues presented in the petition and return, if judgment be for relator it is that a peremptory writ issue; the only proper return to the peremptory writ is obedience.

In extremely rare cases it is possible that the peremptory writ may issue immediately upon presentation of the petition. Such cases are, however, so rare and unusual as not to deserve being characterized as exceptions.

The manner of service and length of notice are matters wholly of statutory regulation. The service of the alternative writ is usually a personal service; always of the peremptory writ.

Disobedience of the commands of the peremptory writ is punished by attachment for contempt. Costs usually follow the event of the suit.

DOOLITTLE ET AL. V. COUNTY COURT OF CABELL COUNTY.

1886. SUPREME COURT OF WEST VIRGINIA. 28 W. Va. 158.

GREENE, J.—(Omitting part of the opinion.) * * *

"1. The usual and proper mode of proceeding in this state in cases of Mandamus is for the plaintiff to file a petition in the court having jurisdiction of the case setting forth the facts of his case, on which he bases his claim for a mandamus, and praying for the writ, specifying in his petition the specific act or acts, which he asks to have the defendant commanded to perform. The facts set out in this petition must be such as *prima facie* entitle the plaintiff to the relief he seeks, and the petition should be supported by affidavit, if filed by a private person. On filing of this petition which is *ex parte*, the court, if a *prima facie* case is thereby made out, on the plaintiff's motion makes an order, which, reciting that the petition is filed, orders, that the defendant after being previously served with a copy of the order to appear on a certain day fixed by the court and show cause if any he can, wherefore a writ of mandamus should not be awarded the plaintiff to command the defendant to do the specified acts, which command should cor-

respond with that asked for in the petition. If on the return day of this rule it has been served and the defendant files no answer, the court either orders a peremptory mandamus to issue against him or compels him to file an answer, as one or the other may be proper in the particular case. If he files an answer, and it be insufficient at law, the court proceeds as if no answer had been filed; if it be sufficient in law, no peremptory mandamus is issued, but if the court sees, that there is a disputed question of fact between the parties, it should order an alternative writ of mandamus to be issued, and it does not permit a demurrer or a replication to be filed to the answer to the rule; or the court may and usually does dispense with the issuing a rule to show cause why a mandamus should not issue, and immediately on the filing of the petition, if a *prima facie* case is thereby made out, orders an alternative writ of mandamus to be issued. The alternative writ sets forth by distinct recital, and not by reference to the petition, all the facts necessary to show the plaintiff's right to the writ of mandamus which he asks; and by it the defendant is commanded to perform the particular act specified in it (which should properly be the same as that stated in the rule or petition, but which may be different) or that cause be shown to the contrary in a given time. It is regarded as the plaintiff's declaration. If the defendant does not make a return to this alternative writ, the court may either order a peremptory writ of mandamus, or enforce the filing of a return, as may be proper in the particular case. The defendant may move to quash the alternative writ, which is equivalent to a demurrer to it, or he may make a return. This return is regarded as his plea; and it may be replied to, and the pleading proceed, as in ordinary common law suits, till an issue of fact or law is reached and tried.

"2. To the pleadings in cases of mandamus, the ordinary rules of pleading are applied, neither greater nor less certainty being required in them than in the pleadings in ordinary common law suits. But the facts set forth by the plaintiff in the alternative writ of mandamus are set forth by way of recital and not in the positive manner that is required in an ordinary declaration in a common law suit." * * *

PEOPLE EX REL. ASPINWALL v. THE SUPERVISORS OF THE COUNTY OF RICHMOND.

1863. COURT OF APPEALS OF NEW YORK. 28 N. Y. 112.

THE relator sued out a mandamus requiring the supervisors to audit certain damages assessed for the land of the relator taken for a highway, and to the end that the same should be levied

and collected in the town of Southfield, or to show cause, etc. The supervisors answered the writ, denying some of the allegations in it, and alleging some new matters. The relator replied, and the issues were tried at a circuit, and the court directed the jury to render a verdict for the relator for \$200, the original claim, and the interest thereon, amounting to \$84. To this direction the defendant excepted. The verdict was for \$284, for which sum and costs judgment was entered, and it was affirmed at general term. There was no other judgment. * * *

MARVIN, J.—It will be seen on consulting the case as reported in N. Y. Rep. vol. 20, p. 252, that most of the questions originally raised, and some of which are reviewed, have been disposed of by this court.

The regularity of the proceedings in laying out the highway and in assessing the damages, and the proceedings of the relator to procure the action of the board of supervisors, as then discussed, were affirmed. There was nothing in the case then calling for or justifying any decision or opinion touching the form of the judgment to which the relator was entitled. Can this judgment against the supervisors be sustained? No case in point is cited, but we are referred to the statute, by which the person prosecuting the writ of mandamus may demur or plead to the return made to the writ, to which the person making the return shall reply, take issue or demur, and declaring that "the like proceeding shall be had therein, for the determination thereof, as might have been had if the person prosecuting such writ had brought his action on the case for a false return." 2 Rev. Stat. 586, § 15. By the 17th section it is declared, that "in case a verdict shall be found for the person suing such writ, or if judgment be given for him on a demurrer or by default, he shall recover damages and costs in like manner as he might have done in such action on the case as aforesaid, and a peremptory mandamus shall be granted to him without delay." It seems to have been supposed that in case the return to the writ was false, the proceedings might be regarded as an action on the case for a false return, and that the relator would be entitled to recover of the defendants as damages the amount he was entitled to receive of the town of Southfield, waiving, I suppose, his right to a peremptory mandamus. Such view would be entirely erroneous. A brief reference to the history of the proceedings by mandamus will enable us to better understand the statute. A mandamus is a prerogative writ issuing in the name of the king from the court of King's Bench, and directed to any person, corporation, or inferior court, etc., requiring them to do some particular thing which appertains to their office and duty. It was introduced to prevent disorder from a failure of justice and defect of police. Bacon Abrid. tit. Mandamus; Jacob Law Dict.

same title; 2 Blackstone Comm. 110. The first writ issued is generally alternative, commanding the thing to be done, or that cause to the contrary be shown. This cause might be shown by a return to the writ, which, if sufficient in law, prevented the issuing of the peremptory writ, and the proceeding came to an end. It is easy to see that while the law remained in this condition the party suing out the writ might be defeated of his rights, by a return, to the writ, of facts, good in law, to defeat the claim, such alleged facts being, however, untrue. In such a case the party suing out the writ could institute an action on the case for a false return, in his own name, against those making the return, and could recover the damages he had sustained by reason of such false return; and thereupon the court, upon a new motion founded upon the *postea* or judgment in the action for the false return, would grant the writ of mandamus in the peremptory form. Jacob Law Dict. tit. Mandamus; Bacon Abridg. tit. Mandamus, L. & M.; 3 Blackstone Comm. 111, 264, 265.

In this state of the law the statute of 9th Anne, Ch. 20, was enacted, authorizing pleadings by the parties subsequent to the return and trial of the issues, and declaring that the same proceedings may be had as if an action on the case had been brought for making a false return, and that damages and costs might be recovered, and declaring that a peremptory writ of mandamus shall be granted without delay, as might have been had the return been adjudged insufficient. Bacon Abr. tit. Mandamus, H. The statute of Anne related to officers, and some subsequent statutes extended its provisions to other cases. The provisions of our own statute are taken from these statutes, and seem to include all cases. But it does not follow that the relator will be entitled to damages, other than nominal, against the defendant in all cases. Under the statute of Anne and our statute he is to have, upon recovering judgment, a peremptory mandamus granted to him without delay. If it is a proper case for damages to be recovered of those against whom the writ is prosecuted, then he may recover such damages in addition to his judgment for the peremptory mandamus, without resorting to his action for a false return. In the case of an expulsion from office, or the refusal to induct into an office, actual damages may have been sustained by reason of the loss of the emoluments of the office during the time of the deprivation. But in a case where the writ itself is a complete remedy, and gives to the party all he is entitled to, how can it be said that he is entitled to other damages against the defendants? It is to be kept in mind that the peremptory writ is to be granted to him without delay. In this case, the material issues being found in favor of the plaintiff, the judgment should have been that a peremptory mandamus issue to the board of supervisors commanding them to

audit the account as commanded in the alternative writ. And I see no ground for any damages, other than nominal, against the defendants, provided the board of supervisors can be required to include in the damages, assessed at \$200, the interest thereon from the time when the claim was presented and should have been audited. If this cannot be done, as against the town of Southfield, then I am inclined to think the defendants may be liable for such interests by way of damages, assuming that they make a false return to the writ.

* * * The court upon consultation, is of the opinion that the supervisors could only audit the damages assessed, with the charges, etc., as provided in the highway act, sec. 2 Rev. Stat. 399, § 93, 5th edition; and that no more could be levied or collected of the town, § 94. That as the return of the supervisors was false, and the relator has been kept out of the damages to which he was entitled from the town, the supervisors may properly be made liable in damages to the extent of the interest upon the \$200, to wit, \$84. Also, that all the facts are before the court, enabling it to modify the judgment by reversing as to the \$200 damages, and affirming it as to the interest as damages, and directing that the judgment be so amended as to grant to the relator the writ of mandamus without delay. Neither party to have costs of this appeal.

All the judges concurring.

Ordered accordingly.

STATE EX REL. SHARP v. WEEKS.

1887. SUPREME COURT OF MISSOURI. 93 Mo. 499.

SHERWOOD, J.—* * *

I. The alternative writ of mandamus was issued by a member of this court in vacation, returnable to this term. A motion, based on that ground, has been filed to quash the writ. The statute authorizes a judge of this court to issue such a writ in vacation. Rev. Stat. § 3254. This statutory provision does not impinge upon section 3, of article 6, of our state constitution. If, however, such a writ should be issued in manner as aforesaid, and the judges of this court should determine that it had been improvidently issued, this might result in the writ being quashed; but this result would not follow merely because the writ was issued in vacation. The motion to quash is, therefore, in this instance denied. * * *

See section 4301 R. S. Mo. 99ff.

CHAPTER II.

QUO WARRANTO.

Section 1.—In General.

1. Definition, origin and history of the writ.

"A WRIT of *quo warranto* is in the nature of a writ of right for the king, against him who claims or usurps any office, franchise or liberty, to inquire by what authority he supports his claim, in order to determine the right. It lies also in the case of non-user or long neglect of a franchise, or mis-user or abuse of it; being a writ commanding the defendant to show by what warrant he exercises such a franchise, having never had any grant of it, or having forfeited it by neglect or abuse. * * * And in case of judgment for the defendant he shall have an allowance of his franchise; but in case of judgment for the king, for that the party is entitled to no such franchise, or hath disused or abused it, the franchise is either seized into the king's hand, to be granted out again to whomever he shall please; or if it be such a franchise as may not subsist in the hands of the crown, there is merely judgment of ouster, to turn out the party who usurped."

"The judgment on a writ of *quo warranto* (being in the nature of a writ of right) is final and conclusive even against the crown. Which, together with the length of its process, probably occasioned that disuse into which it is now fallen, and introduced a more modern method of prosecution, by *information*, filed in the court of king's bench by the attorney general, in the nature of a writ of *quo warranto*; wherein the process is speedier and the judgment not quit so decisive. This is properly a criminal method of prosecution, as well to punish the usurper by fine for the usurpation of the franchise, as to oust him, or seize it for the crown; but hath long been applied to the mere purposes of trying the civil right, seizing the franchise, or ousting the wrongful possessor; the fine being nominal only." III Blackstone Comm. 262, ff.

"The modern information in the nature of a *quo warranto* may be defined as an information, criminal in form, presented to a court of competent jurisdiction, by the public prosecutor, for the purpose of correcting the usurpation, mis-user or non-user, of a public office or corporate franchise." High, Ex. Leg. Rem. § 591.

DARLEY v. THE QUEEN.

1845. HOUSE OF LORDS. 12 Clark & Finnelly, 520; 69 Rev. Rep. 121.

LORD CHIEF JUSTICE TINDAL:

My lords, in this case your lordships have put the following question to Her Majesty's Judges, viz:—"An information, in the nature of a *quo warranto*, having been granted for usurping the office of treasurer of the public money of the county of the city of Dublin, and a judgment having been awarded by the court thereon, is such judgment, regard being had to the nature of the office, erroneous?" And in answer to this question, I beg to state that it is the opinion of all the judges who heard the argument at your Lordships' bar, that such judgment is not erroneous.

The mode of proceeding by information, in the nature of *quo warranto*, came, no doubt, in the place of the ancient writ of *quo warranto*. This writ was brought for property of, or franchise derived from, the crown. The earliest is to be found in the 9 Richard (I) (*Abbreviatio Placitorum*, p. 21), and is against the incumbent of a church, calling on him to show *quo warranto* he holds the church. Then follow many others, in the time of John, Henry II and Edward I, for lands, for view of frankpledge, for return of writs, holding of pleas, free warren, plain-age, and presage (*Abbreviatio Brevium*, p. 210; 14 Edw. I.), emendation of assize of bread and beer, pillory and tumbrel, and gallows. Some of these are offices or in the nature of offices, as in the instance of the returns of writs and holding of courts.

The practice of filing informations of this kind by the attorney general, in lieu of these writs, is very ancient; and in Coke's Entries are many precedents of such informations against persons for usurping the same sort of franchises, as claiming to be a corporation, to have waifs, strays, holding a court leet, court baron, pillory and tumbrel, markets, prison, or for usurping a public office as conservator of the Thames, and coal and corn meter.

It is only in modern times that informations have been exhibited by the King's coroner and attorney. The first reported case is that of *Rex v. Mayor of Hertford*, 1 Ld. Ray. 426, in 10 Will. III. And it is a mistake to suppose that these informations were founded on the statute of 9 Anne, *Rex v. Gregory*, 2 R. R. 371 and in *Rex v. Williams* (1 Burr. 402), where the right to file an information at common law, by the coroner and attorney, against a person for holding a criminal court of record, was recognized.

After the statute of 4 & 5 W & M, which restrained the filing of informations by the coroner and attorney, the sanction of the

court was required, and after that statute and the 9 Anne, it exercised a discretion to grant or refuse them to private prosecutors, according to the nature of the case.

It has uniformly done so in cases under the statute 9 Anne, c. 20, *Rex v. Stacy*, 3 T. R. (K. B.) 2, and *Rex v. Trevenen* (21 R. R. 364), (2 B. & Ald. 479), by virtue of the words requiring the leave of the court. In the case of the bailiff of the court leet, the court granted leave to file an information expressing, however, a doubt whether the office was of sufficient importance; and in that of a petty constable where the right to elect was in dispute between the inhabitants and the lord of the manor, the court refused it saying, "no doubt the king has the right to call anyone to account by his writ of *quo warranto* for exercising any public office be it ever so small; yet we do not use to grant informations in the nature of *quo warranto* for such inferior offices."

Since the courts have exercised a discretion under the Statute of William and Mary and the Statute of Anne, the cases in which there has been a refusal to allow an information to be filed are not necessarily authorities against the validity of an information when filed, because in the cases of refusal the courts may have proceeded on the ground that the circumstances were not such as to call for interference.

On the other hand, those in which informations have been granted, are authority in favour of their validity. That an information of this nature will lie for offices granted by charter, is a matter beyond dispute; and the authorities are numerous that the same remedy is available against intruders into offices of a public nature, which are supposed to be immediately or mediately derived from the crown, and existing at common law, though of a very subordinate character; as bailiff of a court leet; *Rex v. Bingham*, 2 East (K. B.) 308; or of a borough, *Rex v. Highmore*, 1 Dowl. & Ry. 438; 5 B. & Ald. 771; a constable, *Rex v. Goudge*, 2 Str. 1213; *Rex v. Franchard*, 2 Str. 1149; The Stewart of a court leet, *Rex v. Hulston*, 1 Str. 661; and registrar and clerk of a court of requests, *Rex v. Hall* (25 R. R. 321 (1 B. & C. 123)). The cases of overseers in which the court has refused the liberty to proceed in this way, may be possibly explained on the ground that it did not see fit to interfere with officers whose functions were merely temporary; so also as to church wardens, *Rex v. Dawbeny*, (2 Str. 1196); though Lord Kenyon expresses his opinion as to the case of the latter that for such an office an information in the nature of a *quo warranto* will not lie, for it lay only where the old writ of *quo warranto* could have lain, and that would not lie except for a usurpation on the prerogatives and rights of the crown: *Rex v. Shepherd*, 2 R. R. 416, 4 T. R. (K. B.) 381.

But supposing that this proceeding is applicable only where rights of the crown, as in the instances of offices derived from the

crown, are concerned, it is not confined to such as are created by charter, or which may be presumed to have been originally so created. It has been held to apply to offices constituted by Parliament; nor can any good reason be assigned why it should lie, where the crown alone creates the office by its prerogative, and not lie where it creates it with the advice and consent of the Lords and Commons. Accordingly an information has been held to lie for a corporate office created not by charter, but by an act of Parliament; *Rex v. Duke of Bedford and others*, 1 Barnard K. B. 242; so for the office of commissioners for paving under a local act, *Rex v. Badcock*, 6 East (K. B.) 359; and for the office of trustees of a harbour, *Rex v. Nicholson*, Str. 299; though constituted by a private act, their duties being public; and the court said that informations have been constantly granted when any new jurisdiction or public trust is exercised without authority, and the argument that these informations were granted only where the crown alone could have granted the franchise, was expressly overruled. The answer attempted to be given to the last mentioned case, when cited as an authority in the present, is, that this office concerned the franchise of a port; but this was not satisfactory, for the information was not for the franchise, but for the office, which was clearly created by Parliament, and the reference by the court to the circumstances of this office concerning a port, is only to show that it was a public office.

The more modern authorities are conflicting, informations having been granted and also refused for the usurpation of offices created by statute. They were granted against a person claiming to act as guardian of the poor in Exeter, under 28 Geo. III, c. 76, in Hilary Term, 1816, against Paving Commissioners of the city of Exeter, in the year 1834; *Rex v. Beedle*, 42 R. R. 437, 3 Ad. & El. 467, n. In 1830, in the case of *Rex v. Hanley*, 42 R. R. 434, 3 Ad. & El. 463 Lord Tenterden, and Taunton and Patteson, Justices, were granting an information against a trustee for paving and lighting under a private act. Mr. Justice James Parke was in favor of it, and the matter was terminated without any judgment being delivered.

An information was refused against a commissioner of the poor and for watching, under a local act, by the opinion of Taunton and Patteson, Justices, who held that the information would not lie, Lord Denman doubting: *Rex v. Ramsden*, 42 R. R. 431, 3 Ad. & El. 456, and the same course was followed in *Re The Aston Union*, 6 Ad. & El. 785, the judges there holding themselves bound by the former decision to refuse a *quo warranto* to decide the validity of an election of a guardian of the poor under 4 & 5 Will. IV, c. 76. Whether in the former case or the latter, the court decided on the ground that the office was not public in such a sense as to make it the subject of that proceeding, or that, being created by the act of

Parliament, and not by charter, the remedy by information was improper, we are not told by the short report of the judgment in that case.

On whatever grounds these two last cases were decided, we cannot consider them as authorities to establish the position that a *quo warranto* information will not lie for usurping an office created by Act of Parliament, when that office is clearly of a public nature. And after a consideration of all the cases and dicta on this subject the result appears to be, that this proceeding by information in the nature of *quo warranto* will lie for usurping any office, whether created by charter alone, or by the crown, with the consent of Parliament, provided the office be of a public nature, and a substantive office, not merely the function or employment of a deputy or servant held at will and pleasure of others; for with respect to such employment, the court certainly will not interfere and the information will not properly lie. The case of the Registrar of the Bedford Level, *Rex v. The Corporation of Bedford Level*, 5 East (K. B.) 356, and that of a county treasurer, who is the mere servant of the justices in England, *Rex v. Justices of Herefordshire*, 22 R. R. 830, 1 Chitt. 700, are instances of this latter sort.

There are then, only two questions with respect to this office. Was it public? and was the treasurer the mere servant of the Dublin magistrates?

The functions of the treasurer were clearly of a public nature he was to applot the assessment, receive and hold the money for a time, keep it subject to his order on the bank, pay the expense of public prosecutions, and pay other public moneys. It is clearly, therefore, of a public nature, and it is equally clear that, though appointed by the magistrate (*sic.*) he is not removable at their pleasure, and must, we think, be treated not as their servant, but as an independent officer.

If the crown had established this office with precisely the same functions, the person filling it being removeable in the same way as an officer of a corporation created by a charter, there can be no doubt that an information would lie, and the circumstance that the crown has enacted that there should be such an office, with the consent of the two other branches of the legislature, has been shown to make no difference.

We think for these reasons that the nature of the office held by the plaintiff in error was such for which an information in the nature of a *quo warranto* may be sustained, and that the judgment thereon is not erroneous.

The judgment was affirmed without costs.

For an interesting commentary on the early history of the writ and its abuses, see *People v. Bristol, etc.*, Tpk. Co., 21 Wend. (N. Y.) 222.

Origin and History.—2 Reeves' History 220; Crabbes' History of English

Law 174; Comyn's Digest, *Quo Warranto*; High, Ex. Leg. Remedies, section 591 ff.

3. The ancient "writ" and modern information.

"It is somewhat strange that the ancient and modern forms (of the writ of *quo warranto*) should ever have been confounded, since there is really no more legal identity between the writ and the information than between any of the several other common law actions which took their distinctive names from the original process issuing out of the high court of chancery, by which they were commenced and the petition of other writing by which courts are set in motion in any case where an ordinary or extraordinary remedy is sought." 2 Spelling Inj. and Ex. Leg. Rem. § 1769.

THE STATE v. THE WEST WISCONSIN RAILWAY COMPANY.

1874. SUPREME COURT OF WISCONSIN. 34 Wis. 197.

(ACTION brought by information in the nature of *quo warranto*, exhibited by the attorney general on leave of the court to have a forfeiture of the defendant company's charter declared and the corporation dissolved. Defendant demurred to the complaint on the ground (among others) that the court had no jurisdiction, since the constitution of Wisconsin in giving the court jurisdiction in "writs of *quo warranto*" thereby conferred no power to entertain informations in the nature of *quo warranto*.)

DIXON, C. J. The only point urged in support of the demurrer and the only question to be considered, is that pertaining to the jurisdiction of the court. The learned counsel for the defendant urges and argues very ingeniously, and with an industrious presentation of authorities, to show that this court has no jurisdiction of the action when the purpose is to vacate the charter or annul the existence of a private moneyed or commercial corporation. It seems that the argument is one of the kind that refutes itself by proving too much. The position of counsel fairly stated is, that section 3, article 7 of the constitution confers upon this court jurisdiction only of those cases which in ancient times were remediable by the writ of *quo warranto* and not of those to which the information in the nature of a *quo warranto* had been applied after the writ had fallen into disuse. This is in direct conflict with the decisions of this court in at least three cases, in which substantially the same position was taken and directly overruled. *Attorney General v. Blosson*, 1 Wis. 317; *Attorney General v. Barstow*, 4 Wis. 567; *State v. Messmore*, 14 Wis. 115. But to proceed with the argument

of counsel, his view is, that as the writ of *quo warranto* had never been used to vacate the charter or annul the existence of a private moneyed or commercial corporation, because no such corporation had ever existed before the time the writ fell into disuse or was superseded by the information in the nature of *quo warranto*, therefore this court has no jurisdiction of the information in such case, it being one beyond the purview of the constitution or grant of power contained in it. Counsel argues that although the proceeding in the nature of the information may be adopted, or that by civil action as a substitute, yet that the class or classes of cases over which jurisdiction is conferred upon this court are limited to such as were the proper subjects of the writ of *quo warranto* at the time that writ ceased to be used and the information took the place of it. The argument is founded altogether upon the use of the words "writ of *quo warranto*" in the constitution, instead of the words "information in the nature of *quo warranto*" and, if correct, would take us back for a period of five hundred years or thereabouts to ascertain the class or classes of cases or particular subjects over which jurisdiction was given or intended by the clause of the constitution under consideration. It requires but a brief study of the history of this branch of the English Law to show the burden assumed by the learned counsel were he to attempt to point out and fix the limits of the jurisdiction thus conferred upon the court; or to show the difficulties by which the court would be surrounded if it were compelled to solve the question and determine the extent of its own powers upon any such view or construction of the constitutional provision. It will be found that the whole subject is so veiled and hidden in the mists and clouds of antiquity that few courts or authors ever essay to give any explanation of it, and that no living lawyer or student, however versed in ancient law or antiquarian in his legal pursuits and studies, would be competent to unfold the problem or clear up the doubts and uncertainties by which it is on all sides beset. In the first place it will be learned that it is a point beyond the power of human reach or effort, to ascertain the time when the writ of *quo warranto* fell into disuse and the information became a substitute for it in all cases. It can only be known that both are common law proceedings and were in use at the same time, probably as early and maybe much earlier than the thirteenth century. Most writers are entirely silent upon the subject, regarding it as one respecting which elucidation is impossible or impracticable. The only author whose works have come under our observation and who attempts any explanation of it, is Mr. Tancred, whose learned and instructive treatise on the Law of *Quo Warranto* was published in London in 1830. In the introduction to his treatise, p. XVI, after having quoted from Bracton, ch. 19, "On Eyres and Franchises", and having shown the three classes of people holding franchises liable to be proceeded against, and the three

modes of inquiry to be pursued respecting them before the justices in the court of eyre, the author says of the third class, that they "were those who had not made claim, and who had been presented as holding franchises by the inquest of their bailiwick. *In this last mode we seem to discover the origin of information in the nature of a quo warranto.* The use of the presentment in eyre was to bring under the legal cognizance of the justices the fact that a franchise not claimed was held by an individual within their jurisdiction; the same is the office of the presentment, or indictment or information in the court of King's Bench." The remarks of the author and the nature of the proceedings are explained by the context, and the whole subject, as well as the causes which led to the enactment of the statute of *quo warranto*, 18 Edw. I, stat. 2, read by counsel on the argument, are made quite intelligible in Reeve's History of English Law, by Finlason, Vol. II, pp. 126-129, and Vol. I, p. 416 and following. See also Crabbe's History of the English Law, pp. 174-5.

And again at page 18, Mr. Tancred says that "the power of the attorney general, and of his deputy, the master of the crown office, in respect to the filing of informations in the nature of *quo warranto*, equally with their powers of filing informations in misdemeanors in general, are derived from the common law." And at page 15, speaking of the erroneous impression that the statute of 9 Anne (A. D. 1711), c. 20, originally conferred power upon the coroner to file such informations, the author observes:—"The records of the crown office leave no room to doubt, that informations were filed by the coroner anterior to that statute, even in cases directly within its provisions, which clearly shows that the latter statute did not first introduce these informations, but only made some regulations with respect to the prosecution of them. The act of the 9th of Anne extends only to the cases of individuals usurping offices or franchises in corporations, when the right of the body to act as a corporation is acknowledged; an information against the whole corporation as a body, to show by what authority they claim to be a corporation, can only be brought by and in the name of the attorney general.

And the same writer's remarks upon the statute, 18 Edw. I, passed in the year 1290, are so illustrative of the hopelessness of the mission upon which the learned counsel would send the court in search of its jurisdiction under the constitution, that we are disposed to transcribe them at length as the best comment which can be made. The learned counsel himself only suggests doubts and suspicions respecting the jurisdiction, without pursuing the inquiry or pausing to assist the court out of the tangled web of antiquated precedents and distinctions into which it would inevitably be drawn by adopting his views. It is incumbent on counsel or court accepting such conclusion, to point out at least with some approach to

clearness and precision the jurisdiction which the court has, or the class or classes of cases of which it will take cognizance. It is not enough under such circumstances to say that the case at bar is not one which was remediable by the writ of *quo warranto*, or to which that remedy was applied in the reign of Edward I. Some regard must be paid to future cases, and to the condition into which the court shall find itself when they do arise, respecting the all-important question of jurisdiction. It is not enough that the court is able to say that there existed no banking, insurance or railway corporations in England during the thirteenth and fourteenth centuries; but the court is, or would be on the theory of counsel, required to go farther, and determine precisely what rights, privileges, franchises and liberties, corporate or otherwise, were examinable, and could be adjudicated on the writ at that distant period. But to return to our author and his remarks, he says: "By the last clause of the *Statutum de Quo Warranto Novum*, 18 Edw. I, the king with a view to spare the costs and expenses of the people of his realm, granted 'that pleas of *quo warranto* should from thenceforth be pleaded and determined in the eyres of the justices; and that the pleas then depending should be readjourned into their own particular shires until the coming of the justices into those parts.'" The precise period of the institution or cessation of the eyres seems unknown. Lord Coke charges with error *in fonte et in fine* those who supposed that Henry II did first institute the justices in eyre; or that they ceased in the time of Edward III. He ascribes to them an indefinite antiquity of origin and shows that they ceased not at the time stated; for that after the reign of Edward the Third, they are mentioned as well known, and the institution as existing in practice; for it was enacted by act of Parliament (in respect of the troubles and foreign affairs) that no eyres should be holden for two years, and at a later period, in 16 R. II (1393) that no eyre should be holden until the next parliament. One probable reason why it is difficult to ascertain the exact period of the extinction of the eyre, is that its decline was gradual; and the cause of that decline seems reasonably referred, by the same author, to the establishment of justices of assize; for, as their power, by many acts of parliament, and the extent of the numerous commissions with which they are entrusted, increased, so that of the justices itinerant vanished away. Whenever the circuits of the justices in eyre ceased, the above provisions in the statute of 18 Edw. I, necessarily lost its effect also; for with justices in eyre this branch lived, and with them it died. The writ of *quo warranto*, therefore, in the same manner as before the passing of the statute, became returnable before the King's Bench, and other courts at Westminster; and the same delays and expensive proceedings which had led to the enactment of the statute of Edward I, were, it may be pre-

sumed, again experienced. Whether such considerations, or the conclusive character of the judgment which was final even against the crown *occasioned the disuse of the proceedings upon the writ of quo warranto, and led to the substitution of that which has since prevailed, can now be only matter of conjecture.* By abandoning the civil process and its long train of dilatory steps, and resorting to the criminal form of an information, a more expeditious decision of the suit was secured; and as the investigation, when the proceedings had assumed a criminal character, took place in the county where the franchises were situated, the object which the legislature had formerly in view was indirectly obtained. *Whatever the immediate cause of the change, and whenever it was brought about, the information was made and has been found to answer all the purpose which were effected by the proceedings under the old writ before the eyre."*

And the observations of Lord Coke, 2 Inst. 498, title, *Statutum de Quo Warranto*, referred to by the author and in part quoted, are useful as revealing to some extent the darkness which surrounds the question. He says, "As to the second point, that justices in eyre should cease in the raigne of Edward III, they have not onely erred *in fonte* but *in fine* also, for they ceased not in the raigne of King Edward III, for it is enacted by act of Parliament after that king's raigne (in respect of the troubles and foreigne affaires) that no eyres should be holden for two yeers; and after 16 R. 2, that no eyre should be holden until the next parliament; but thus much in a case so evident shall suffice: We have added thus much not of curiosity nor of a spirit of contradiction, but for two respects: the one, that when our historians do meddle with any legall point, or matter concerning the law, we would advise them that they would, before they write, consult with those that be learned and apprised in the laws of this realm; the other, that truth might be manifested and prevail."

Now if so great a luminary of the law and student and expounder of the ancient institutions of this country as Lord Coke, who wrote upwards of two hundred and fifty years ago, was in doubt and could not determine when the justices in eyre ceased, and consequently when the writ of *quo warranto* fell into disuse (for we are informed that the writ was used only through the continuance of that institution), how is it possible for any court or lawyer to determine the same question at the present day? And if that question cannot be determined, how is it possible to determine what pleas of *quo warranto*, or franchises or liberties, were cognizable under the writ at the time it ceased to be used? We might stop here, and in the words of Lord Coke say:—"but thus much in a case so evident shall suffice." It is a manifestly endless as well as fruitless pilgrimage in which counsel would engage the court; and the

design of this investigation, since we have come to some preception and knowledge of the subject, has been, "not to let the light in, but the darkness out"—to make the darkness visible.

To accept the views of the counsel would therefore be to say that this court has no definite or ascertainable jurisdiction under the grant of power contained in the constitution. The argument disproves itself, therefore, by proving too much; and it would be better, undoubtedly, to adopt the views advocated by counsel in the earlier cases in this court, namely, that the constitution reserved only the power to issue the ancient writ of *quo warranto*, which as we have seen was a civil writ at the suit of the crown, and ran for lands and tenements as well as franchises and liberties, and in some cases was a mere action for a discovery, and was commenced by proclamation as well as by service of process, and which had been obsolete and unknown in the English courts for nearly four hundred years before the constitution was framed. This would dispose of the whole question by showing that no jurisdiction could be exercised; for no lawyer probably could prepare the writ and conduct the proceedings to a successful termination without personal access to the ancient entries in the crown office, which could not well be had.

The futility and unreasonableness of all such interpretations of the constitution are apparent. It is as impossible to believe that the framers of the constitution were looking back over the period of three or four hundred years into the middle ages, desiring to give this court jurisdiction, and only such, as was then exercised in virtue of the writ of *quo warranto*, as it is that they intended to confine the court to that useless and antiquated process. The framers of the constitution were practical men, and were aiming at practical and useful results. They used the words "writ of *quo warranto*" just as they had been used in common parlance, and by courts, lawyers, and writers for hundreds of years, as synonymous with "information in the nature of *quo warranto*," which had for so long been the complete and unqualified substitute for the writ. "This (the information) is properly a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise as to oust him, or seize it for the crown; but hath long been applied to the purposes of trying the civil right, seizing the franchise, or ousting the wrongful possessor; the fine being nominal only." 3 Blackstone Comm., 263. By the statute of this state the fine may be something more than nominal only. Rev. Stat., ch. 160, § 15; 2 Tay. Stats., 1812, § 21. And in the early and leading case in New York, *The People v. The Utica Insurance Company*, decided in 1818, and reported 15 Johns. (N. Y.) 358, in which the remedy by information was applied to one of these modern private moneyed or commercial corporations, we find Judge Spencer using the following language: "An information in the nature of a *quo warranto* is a substitute for

that ancient writ which has fallen into disuse; and the information which has superseded the old writ is defined to be a criminal method of prosecution, as well to punish the usurper for the usurpation of the franchise by a fine, as to oust him, and seize it for the crown. It has for a long time been applied to the mere purpose of trying the civil right, seizing the franchise or ousting the wrongful possessor, the fine being nominal only. 2 Inst. pl. 12; 3 Burr. (K. B.) 1817; 4 T. R. (K. B.) 381; 1 Bulst. 55." Now it was with a view to this well known jurisdiction then and long before only exercised in the proceedings by information, that the framers of the constitution gave or reserved the power of this court, using for convenience and brevity merely the words "*writ of quo warranto*" just as these words were used by Chancellor Kent in *Attorney General v. Utica Ins. Co.*, 2 Johns. (N. Y.) Ch. 371, 376, and as they had been used by other courts and writers time without number, and as they are still even used in our statute, Rev. Stat., ch. 160, § 1; 2 Tay. Stats., 1807, § 1, as meaning the same thing and intended to convey the same general idea as the words "information in the nature of *quo warranto*."

We are aware that a different interpretation has been given to a like clause in the constitution of the state of Arkansas and also the state of Missouri. *State v. Ashley*, 1 Ark. 279; s. c. *id.* 513. See also *State v. Real Estate Bank*, 5 Ark. 595; *State v. Johnson*, 26 *id.* 281; *State v. Ins. Co.*, 8 Mo. 330; *State v. Stone*, 25 Mo. 555. The earlier cases in Missouri held to the rule which we adopt. *State v. Merry*, 3 Mo. 278; *State v. McBride*, 4 *id.* 303. And such we think is almost the universal American rule. See *State v. Gleason*, 12 Fla. 190. Of the cases still adhering to the distinction between the writ and the information, that first above cited is the best reasoned and most elaborate; but after a careful perusal of the arguments and the opinion, it seems to us that counsel for the motion, which was overruled, were sustained by much the stronger reasoning. In Pennsylvania, it appears, that there is a statutory writ of *quo warranto* in many respects resembling the ancient one. *Commonwealth v. Burrell*, 7 Pa. St. 34. * * *

BY THE COURT.—Demurrer overruled.

In accord.—*State v. Leatherman*, 33 Ark. 81; *People v. Keeling*, 4 Colo. 129; *State v. Anderson*, 26 Fla. 240; *Capital City, etc., Co. v. State*, 105 Ala. 406; *State v. Merry*, 3 Mo. 278.

Contra: *State v. Vail*, 53 Mo. 97; *State v. Stone*, 25 Mo. 555; *State v. St. Louis, etc., Ins. Co.*, 8 Mo. 330.

In the case last cited the Missouri Court distinguishes carefully between the "*writ of quo warranto*," which issues as a matter of right and the "information," leave to file which, rests wholly in the discretion of the court.

3. Writ criminal in form but civil in nature.

THE COMMONWEALTH v. McCLOSKEY ET AL.

1830. SUPREME COURT OF PENNSYLVANIA. 2 Rawle (Pa.) 369.

(Only that portion of the opinion of GIBSON, C. J., dealing with the point in question is here given.)

GIBSON, C. J.—This species of information was freely used by the crown in disfranchising most of the corporate towns of England, previous to the statute of 9 Anne 8, 20, which gave no new remedy, but enlarged an existing one, by authorizing it, at the instance of an individual, and allowing costs to the relator or respondent, according to the event. The circumstance of that statute not being in force here, furnishes no argument against the information as an existing remedy. It is, however, so far modified by usage, in analogy to the statute, as to be grantable at the relation of an individual; but in every other respect, it has been considered to be in force here, as the common law. It is declared in the constitution, art. 9, § 10th, "That no person shall for an indictable offense be proceeded against criminally by information," except in certain specified cases. But every information is in form, a criminal proceeding; and the framers of the constitution were guilty of pleonasm, unless they meant to assert, that there are cases in which it may be used substantially as a civil remedy. Now, it so happens, that the best of the elementary authors has asserted the same thing. As a method of criminal prosecution, the information in the nature of a *quo warranto*, has long fallen into disuse, the fine being merely nominal, and the effect of the judgment to oust the intruder; and thus restricted, it is now used to try title to a franchise. 3 Comm., 263. In fact, it contains all that is valuable in the ancient writ of *quo warranto*; to which with its uncouth forms and interminable proceedings and pleadings, the necessity which there often is, of giving redress in some shape, would compel us to return. Can it be doubted then, that the convention, containing as it did, many of the ablest lawyers in the state, had particularly in view the preservation of this proceeding as a civil remedy? Even were that doubtful, yet the point has been settled by contemporaneous construction and long practice. The Commonwealth v. Wray, 3 Dall. (Pa.) 490, in which it was expressly ruled, was within nine years from the adoption of the constitution; since when, it has been followed as a precedent, by different judges, through six successive cases, in which the principle was reasserted without the expression of a doubt, either on the bench or at the bar; which ought, one would think, to put the matter at rest. After thirty years' practice, to question a train of authorities such as these, tends to shake all confidence in the stability of

judicial decision, and leave the law itself in a state of distressing uncertainty. * * *

In accord.—State v. Ashley, 1 Ark. 279; State v. Price, 50 Ala. 568; Robertson v. State, 109 Ind. 79; State v. Campbell, 120 Mo. 396; State v. DeGress, 53 Tex. 387; Commonwealth v. Birchett, 2 Va. Cas. 51; Attorney-General v. Barstow, 4 Wis. 567.

Contra.

NEILL DONNELLY, APPELLANT, v. THE PEOPLE OF THE
STATE OF ILLINOIS EX REL. DERRICK C. BUSH,
APPELLEE.

1850. SUPREME COURT OF ILLINOIS. 11 Ill. 552.

THIS was a proceeding by *quo warranto*, instituted against the appellant, in the McHenry Circuit Court, on the relation of Bush, charging that the appellant had usurped the office of sheriff of McHenry county, and enjoyed the privileges and franchises thereof; assigning as a special cause, that he had omitted, when taking the oath of office, to take the anti-duelling oath prescribed by the constitution.

The relation commenced:—"And now comes Alonzo Platt, state's attorney for the eleventh judicial district of the state of Illinois, and on the relation of Derrick C. Bush who sues for the people in this behalf, and for the said people gives the court here to understand and be informed," etc., and concluded as follows:—"that appellant intrudes into the office "contrary to law, and to the damage and prejudice of the said people of the state of Illinois; whereupon the said attorney of the people prays the advice of the court, etc."

The information was sustained by the Circuit Court, HENDERSON, Judge, presiding. There were several proceedings in the court below, which are not noticed here, inasmuch as they were not necessary to an understanding of the points decided.

Opinion by MR. JUSTICE CATON:—

This proceeding is a prosecution, within the meaning of § 26, art. 5 of the constitution, and should have been carried on, and should have concluded, as is there required. That section provides: "All prosecutions shall be carried on "in the name and by the authority of the people of the state of Illinois", and conclude, "against the peace and dignity of the same."

In its broadest sense the word "prosecutions" would embrace all proceedings in the courts of justice, or even elsewhere, for the protection or enforcement of a right or the punishment of a wrong, whether of a public or a private character. The word as here used, however, has not that comprehensive meaning but signifies prosecutions of a public or criminal character. When used in this

sense it means the mode of the formal accusation of offenders, and this may be by presentment, information or indictment. 4 Blackstone Comm., 301; Webster Dict. ("Prosecution").

This proceeding is a substitute for the ancient writ of *quo warranto*, but it is none the less a mode of criminal prosecution, as well to punish the usurper, for the usurpation of the franchise, as to oust him from its enjoyment. The People v. Utita Insurance Company, 15 Johns. (N. Y.) 358. Blackstone says, "This is properly a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of a franchise, as to oust him, or seize it for the crown, but hath long been applied to the mere purpose of trying the civil right, seizing the franchise, or ousting the wrongful possessor; the fine being nominal only." 3 Blackstone Comm. 263. Our statute of *quo warranto* has in no way changed the criminal character of this proceeding. It expressly provides, not only for judgment of ouster, but also that the defendant shall be punished for the usurpation by a fine. Rev. Stat., ch. 86, § 2. The criminal code provides for the punishment of the same offense by indictment. Rev. Stat., ch. 30, § 105. A prosecution under one of these statutes would necessarily be a bar to any proceeding under the other. It is not supposed but that prosecutions under an indictment are within the provisions of the constitution, and indictments have always been framed in conformity to it. This is a rule of pleading prescribed by the constitution, and when not conformed to, the indictment would be void. When the constitution says that prosecutions shall be presented or carried on in a particular mode it is equivalent to saying that they shall not be presented or carried on in any different way. This is not only a criminal prosecution but the rules of pleading, applicable to indictments, govern it. The same certainty and technical precision are required in both, and the principal, if not the only difference, between them is, that an indictment is presented by the grand jury, on their oaths, while in informations in the nature of *quo warranto*, the court is informed of the facts by the state's attorney. In treating of these informations, Serjeant Hawkins says: "An information differs from an indictment in little more than this, that the one is found by the oaths of twelve men, and the other is not so found, but is only the allegation of the officer who exhibits it. Whatsoever certainty is required in an indictment, the same at least, is necessary in an information, and consequently all the material parts of a crime must be precisely found in the one, so must they be precisely alleged in the other, and not by way of argument or recital." 2 Hawkins P. C. 357, § 4.

If, then, an indictment must be carried on "in the name and by the authority of the people of the State of Illinois", and must conclude, "against the peace and dignity of the same," the omission of these essential words in an information, must necessarily be fatal.

The Constitution requires them, and the courts cannot dispense with them. The information being thus fatally defective, it is unnecessary that we should inquire whether the plea to which the circuit court sustained a demurrer, was good or not.

The judgment is reversed, with costs against the relator.

Judgment reversed.

In accord.—*Cheshire v. People*, 116 Ill. 493; *Hay v. People*, 59 Ill. 94; *Wight v. People*, 15 Ill. 417.

In California the information is treated as a mixed form of action, having for its object the protection of private and the enforcement of public rights. *People v. Gillespie*, 1 Cal. 342.

In Idaho the tendency seems to be to emphasize the criminal features of the writ. *People v. Green*, 1 Idaho, 235.

4. The jurisdiction.

IN this country the jurisdiction in *quo warranto* is, together with other extraordinary jurisdiction, conferred usually upon the courts by the state constitutions; but it is seldom that the mode of procedure is prescribed either by statute or by constitution. The courts, therefore, are forced to look to the rules and principles of the common law, governing the writ, in the light of the modifications introduced by the Statute of Anne and the changes affected by our own political and governmental institutions, for the method of procedure and more especially for the occasions under which the writ will issue.

5. Not granted to redress purely private wrongs.

RAMSEY v. CARHART.

1871. SUPREME COURT OF ARKANSAS. 27 Ark. 13.

MCCLURE, C. J. The only question presented by this case, is whether a *quo warranto* will issue on the relation of a private person. It has been held in the *State v. Ashley*, 1 Ark. 279, (see note in *Caldwell v. Bell & Graham*, 6 Ark. 227, and *State v. Williams*,) that the writ of *quo warranto* would only issue on the relation of the attorney general, in the name of the state, in cases where the whole community are interested, and would not be granted at the instance of an individual for the determination of a private right.

The counsel for the appellant ask: "Will anyone say that the jurisdiction of this court depends upon the breath of the attorney general"? and in response to the question says "God forbid". In response to the query propounded by counsel, this court takes occa-

sion to say, that the jurisdiction of this court is derived from and regulated by the constitution of the state, but it is for the attorney general to see whether the offices or franchises of the state have been usurped; he is the law officer of the government, and is presumed to discharge his duty. The office, in controversy, is one created by the constitution; it is a grant of power by the people; the attorney general is their highest law officer and so long as the people do not complain, through him of usurpation of an office or franchise, it is but fair to presume that no usurpation has taken place. It may be asked, if this be true, how can one, entitled to an office, get possession of it, if *quo warranto* is denied, or the attorney general refuses to discharge his sworn duty? Section 525 of the Civil Code, declares that "Whenever a person usurps an office to which he is not entitled by law, an action, by proceedings at law, may be instituted against him, either by the state, or the person entitled to the office." This section furnishes the complainant in this case, with a full and perfect remedy to assert and maintain his right to the office he claims, and neither the neglect of the attorney general, nor a denial of jurisdiction in this court in any manner, interferes with his remedy.

Quo warranto was invented, originally, not to determine which of two persons were entitled to an office, but to require the incumbent to show by what authority he was exercising or attempting to exercise the duties of an office, created by sovereign authority. The issue was between the state and the person in office; and not between the persons who claimed the right to exercise its duties. In short, quo warranto is the writ of the state, and only issues at the instance of the state. It was not, nor is it now designed or used as a remedy at law, by which individuals may contest the right to an office. The legislature has provided a separate remedy for the determination of such a question, and the parties must seek the remedies provided for them, instead of one provided for the state.

The writ is denied and the cause ordered stricken from the docket.
GREGG, J., dissenting.

PEOPLE EX REL. KOERNER V. RIDGELY ET AL.

1859. SUPREME COURT OF ILLINOIS. 21 Ill. 64.

At the April Term, 1857, of the Sangamon Circuit Court, the people by the circuit attorney, upon the relation of Gustavus Koerner, George T. Brown, and Richard Yates, informed the court that on the first day of November, A. D. 1848, by virtue of the act entitled, An Act for finally closing the affairs of the State Bank of Illinois, approved March 1, 1847, the governor duly appointed Nich-

olas H. Ridgely, Uri Manly and John Calhoun, trustees to take charge of the assets and wind up the affairs of the State Bank; that they entered upon the trust and have thenceforward continued to exercise the duties and franchises thereof to the present time. That on the 18th day of February, 1857, the governor of the state, by and with the advice and consent of the senate, duly removed said Ridgely, Manly and Calhoun from said trusteeship, and appointed the relators, but that Ridgely, Manly and Calhoun continue to hold the books, papers and assets of the bank and exercise the franchises of said trust, unlawfully and contrary to the peace and dignity of the people.

To this information a plea was filed, giving a history of said bank and the several acts passed in relation thereto, including the said act for winding up the same, also setting out the connection of the said bank with the state, and the liquidation and adjustment of matters between the bank and the state, also reciting that the bank had conveyed to them by deed all of the assets belonging to it, and that by virtue of the deed the assets were delivered to them; that they accepted the trust and were acting under it; that they had paid the state \$50,000 in its bonds, and that the interests of the state in the bank had been released to said trustees, and that as such trustees they were authorized to act and continued to act; that they were lawfully in possession, and that they be allowed to continue, etc.

To this plea there was a demurrer and joinder. By agreement the issue was decided *pro forma* for the defendants, and an appeal taken to this court.

BRESE, J. An information in the nature of *quo warranto* is understood to be a criminal proceeding (People *ex rel.* Bush v. Neill Donnelly, 11 Ill. 552), and can only be resorted to, in cases in which the public, in theory at least, have some interest. We think an instance cannot be found where it has been allowed against persons for assuming a franchise of a mere private nature, not connected with the public, its interests, or its government. Rex v. Ogden, 21 Eng. C. L. R. 62.

Our statute on this subject (Scates' Comp. 224), provides section one, "In case any person or persons shall usurp, intrude into or unlawfully hold or execute any office or franchise, it shall be lawful for the attorney general or the circuit attorney of the proper circuit, with the leave of any circuit court, to exhibit to such court on information in the nature of *quo warranto* at the relation of any person or persons desiring to sue or prosecute the same," etc. The second section authorizes a judgment of ouster and the imposition of a fine besides the costs. The statute is substantially a copy of the statute of 9 Anne, ch. 20. Both are pointed at the usurpation of, intrusion into, or unlawfully holding and executing certain offices. The offices are specified in the 9th Anne, as offices and franchises in

corporations and boroughs; in our statute they are not specified and that seems to be the only real difference between them. The statute of Anne applies only to corporate offices, and the franchises of a corporate nature, in corporate places.

But at common law, before this statute we understand, informations were filed and sustained in the nature of *quo warranto*, in cases not relating to any corporate office or franchise of a corporate nature in a corporate place, as in cases where a party unlawfully took upon himself to act in any public capacity, touching the rule and government of any place in England or Wales, or the administration of justice, or the political rights of third persons.

The usual object of an information of this nature, is, to call in question the defendant's title to the office or franchise claimed and exercised by him, because of some alleged defect therein, as for instance, that at the time of the election he was disqualified to be elected; or that the election itself was void or irregular; or that the defendant was not duly elected or not duly appointed; or that he has not been duly sworn in, or otherwise unlawfully admitted; or that he has since become disqualified and yet presumes to act. *A defective title is understood to be, and is in contemplation of law, the same as no title whatever, and a person exercising an office or a franchise of a public nature, is considered as a mere usurper unless he has a good and complete title in every respect.* This court has decided that the people are not required to show anything. The entire onus is on the defendant, and he must show by his plea, and prove that he has a valid title to the office. He must set out by what warrant he exercises the functions of the office and must show good authority for so doing, or the people will be entitled to judgment of ouster. *Clark v. The People ex rel. Crane*, 15 Ill. 217.

The information, however, must allege that the person against whom it is filed, holds and executes some office or franchise, describing it, so that it may be seen the case is within the statute. This information contains no such averment, nor anything equivalent to it. The allegation is, that the governor appointed the defendants trustees, to take charge of the assets and wind up the affairs of the State Bank, and that they, then and there, entered upon said trust, and thenceforward have continued in fact to execute the duties and franchises thereof to the present time." It is then averred that the governor by and with the advice and consent of the senate, duly removed them from the said trusteeship and duly appointed the relators "their successors in said trusteeship", of which the defendants had notice; concluding with the averment that the defendants "continue to hold the books, papers, and assets of said bank and exercise the franchises of said trust, unlawfully, and contrary to the peace and dignity of the people", etc.

There is no distinct averment that the defendants hold or execute

any office or franchise, so that the demurrer to the defendant's plea in bar might well have been carried back to the information, for it does not present the statute offense in any sufficiently legal or technical form. *People ex rel. Gillenwater v. Mississippi, etc.*, R. Co., 13 Ill. 66. And the defendants, for the same reason, might have successfully defended against the information, by interposing a general demurrer, for admitting, which the demurrer would do, all the allegations to be true, no case is made out against the defendants. In truth the affirmative facts that they were appointed by the governor, the trustees of the bank, and have taken upon themselves the execution of the trust, and at the time of filing the information were executing the trust, make a case for the defendants, for the validity of their appointment is not assailed.

The real question as the relators have made it, and argued it, is, has the governor the power to remove the defendants from their trust? It is contended by the relators that the governor has such power—that although they are called trustees, they are in fact public officers, and the “trusteeship” is an office or franchise in which the public have an interest, and its incumbents are necessarily under executive control.

We will not question that the power of removal from office where the tenure is not defined by constitution or law whence the appointment originates, resides with the power to appoint, and were this trust confided by the executive to the defendants, a public office, we would not hesitate to accord to him the right to remove him. But is it an office?

An office is defined to be a right to exercise a public function or employment, and to take the fees and emoluments belonging to it, and they are civil and military, and the civil are divided into political, judicial and ministerial. Of the former, the president and the governors of the states, heads of departments, members of congress, of the legislatures, etc., are examples. The judicial are those which relate to the administration of justice, and cannot be exercised by deputy. The ministerial are those wherein the officer has no power to judge of the matter to be done, but must act in obedience to the orders of a superior, and the duties of which can be performed by a deputy. All offices in this country are public. Some employments of a private nature are considered offices, if connected with the public, as a bank or railroad president, treasurer or secretary or director. 2 Blackstone Comm. 31; 3 Kent Comm. 454.

The act under which the defendants were appointed does not declare the trust to be an office, nor in the manner of their appointment was it considered an office. It has none of the indications of an office—no tenure is prescribed—no fees or emoluments allowed, and no salary—nor is there any oath required to be taken. As the relators define it in their petition, it is a mere trusteeship the duties of it being to take charge of the assets and wind up the affairs of the

state bank, pay out its specie on hand *pro rata* and issue certificates of indebtedness to bill-holders and other creditors; in one word, to administer on the effects of a defunct corporation. These were duties of a special character, applicable alone to a particular corporation, and nothing more. It has none of the constituents of an office, none whatever. The defendants have the legal title to all the property assigned to hold to them and to the survivors of them, so that by judgment of ouster they could not be divested of this title. This can only be done by bill in chancery.

Is it a franchise? A franchise is said to be a right reserved to the people by the constitution, as the elective franchise. Again, it is said to be a privilege conferred by grant from government, and vested in one or more individuals, as a public office. Corporations or bodies politic are the most usual franchises known to our laws. In England they are very numerous, and are defined to be royal privileges in the hands of a subject. An information will lie in many cases growing out of these grants, especially where corporations are concerned as by the statute of 9 Anne, ch. 20, and in which the public have an interest. In 1 Stra. (K. B.) (*The King v. Sir William Louth*) it was held that an information of this kind did not lie in the case of private rights, where no franchise of the crown has been invaded.

If this is so—if in England a privilege existing in a subject, which the king alone could grant, constitutes it a franchise,—in this country, under our institutions, a privilege or immunity of a public nature, which could not be exercised without a legislative grant, would also be a franchise.

There must be some parting of prerogative belonging to a king, or to the people, under our system, that can constitute a franchise. Upon these defendants nothing of that kind was conferred. The state having at the time of their appointment as trustees, an interest of \$50,000 in the bank, it was no doubt an amicable arrangement with the bank that the governor should name the trustees. But at that time the charter was forfeited and no franchise remained.

The defendants were appointed trustees on the 31st of October, 1848, on which day the bank, being in liquidation, conveyed to them, by deed duly executed and recorded, all the assets of the bank, real and personal, in trust for the purposes mentioned in the deed, and possession was delivered to them. This deed refers to the second section of the act of 1847 and recites that “the governor having designated the said Uri Manly, John Calhoun and Nicholas Ridgely as the three trustees to be appointed by him under the provisions of that act; now this indenture witnesseth”, etc. By this deed the legal title passed to these defendants.

At this date, the state was still interested in the bank, to the extent of \$50,000 and it was just and right and a partial guarantee to

the public, that this interest should be looked after by agents of her own selection. But on the first of July, 1852, this interest was conveyed to the trustees, as such, on their surrender to the state, of an equal amount of state bonds and other evidences of indebtedness and from that day hence forward the state had no interest whatever in the bank or corporation. All that remained in the bank and of the bank, belonged to its numerous creditors, any one of whom, could, on any day since that date, have filed in chancery a bill against the trustees for an account, and for their removal, and for the appointment of others more trustworthy, the state being in no wise responsible for their conduct or interested in their accounts.

The deed executed by the bank to the defendants, conveys the legal title to all the assets, real and personal, to the defendants, of which the joint action of the governor and the senate cannot deprive them, but a court of chancery can. That court can give adequate relief. It is a case wholly for the courts, with which, neither the executive nor the legislature can rightfully interfere, nor can we in this proceeding, for if judgment of ouster is rendered, the title to the assets is still in the defendants.

These defendants have a high duty to perform, but it is to the creditors of the bank and its stockholders. They are trustees for them and can only, by their mal-administration of its affairs, injure them, and to them the courts will hold them responsible on a proper case made. If the creditors are satisfied with the manner in which the trust is being executed, who shall complain? The public, as such have not a particle of interest in the matter, in any view in which we can regard the case. It is a clear case between trustee and *cestui que trust*—who are not the people, but its creditors and stockholders.

Had the legal estate in the assets passed to the relators by an adequate conveyance, then indeed there might be some pretense of right, to file an information.

The act of 1847, under which the defendants were appointed, refers to the act of 1845, specially applicable to the Bank of Illinois at Shawneetown, which act is to govern in winding up the bank, as far as applicable. By the 13th section of that act, on a vacancy occurring in the board of assignees, it was to be filled by the remaining assignees—if they fail to fill it, then the governor is to fill it.

It cannot be pretended under this act that the governor could make vacancies by his own act, and fill them by his own appointment. The very nature of the trust and the business to be performed under it, forbids the idea that it should be subject to the politics of the country and its many fluctuations.

In every aspect in which we can view this case, it seems a clear case for the defendants and we think the plea is a full and com-

plete bar to the information, and shows a case in which the executive has no power to interfere. As the merits of the case have been thoroughly examined and considered in this proceeding, we make no question as to its propriety as applicable to this case.

The judgment of the circuit court on the demurrer is affirmed, the plea of the defendants being a full answer and bar to the information.

CATON, C. J., did not hear the argument in this case and gave no opinion.

Application denied.

See also, *Commonwealth v. Dearborn*, 15 Mass. 125; *Haupt v. Rogers*, 170 Mass. 71; *Attorney-General v. Bank of Niagara*, Hopk. Ch. (N. Y.) 354; *People v. Mutual, etc., Co.*, 38 Mich. 154; *Attorney-General v. Utica Ins. Co.*, 2 Johns. Ch. (N. Y.) 371; *Commonwealth v. Allegheny Bridge Co.*, 20 Pa. St. 185, 189; *State v. Shields*, 56 Ind. 521, 528; *State v. Meehan*, 45 N. J. L. 189.

Writ refused when sought for purpose of annulling license to practice medicine. *State v. Green*, 112 Ind. 462.

6. Existence and adequacy of other remedies as a defense.

STATE EX REL. VANCE v. WILSON.

1883. SUPREME COURT OF KANSAS. 30 Kan. 661; 2 Pac. 828.

VALENTINE, J. This is an action in the nature of *quo warranto* commenced in this court by the county attorney of Shawnee county, Kansas, to oust the defendant from the office of mayor of the city of Topeka, a city of the first class. The grounds upon which the action is founded are various alleged acts and omissions on the part of the defendant, affecting the due enforcement of the prohibitory liquor law, a certain prohibitory liquor ordinance, and certain laws and ordinances relating to liquor-saloons, bawdy-houses and gambling-houses. It is claimed by the plaintiff that by reason of these acts and omissions the defendant has forfeited his office. "Original jurisdiction in proceedings in *quo warranto*" is conferred upon the supreme court by the constitution of the state, Cons., art. 3, § 3; and this jurisdiction so conferred is just what was understood to be *quo warranto* jurisdiction at the time the constitution was adopted. As throwing light upon the last proposition see *Leavenworth Co. v. Miller*, 7 Kan. 502; *State v. R. R. Co.*, 34 Wis. 197; and this jurisdiction cannot be abolished or increased or diminished by the legislature. *State v. Allen*, 5 Kan. 213; *Graham v. Cowgill*, 13 Kan. 114; *State v. Graham*, *id.* 136. Of course, the legislature has

the power indirectly to affect the exercise of this jurisdiction, as it has the power directly or indirectly to affect almost every other matter or thing coming within the purview of the constitution. It may increase or diminish or create or destroy any particular instances in which this jurisdiction may be exercised; but it cannot increase or diminish or abolish or destroy the jurisdiction itself. Thus, it may create additional offices or additional grounds for forfeiture, and thereby increase the number of instances in which the court may exercise its jurisdiction, or it may abolish some of the offices already existing, or some of the grounds for forfeiture already existing, and thereby diminish the number of instances in which the court may exercise its jurisdiction. In this way it may really create or destroy instances in which the jurisdiction may be exercised. But within these limitations whenever a proper case arises for the exercise of *quo warranto* jurisdiction, as *quo warranto* jurisdiction was known and understood at the time of the adoption of this constitution, this court may take jurisdiction of the case and determine the same, whatever may be the enactments of the legislature on the subject.

Applying these preliminary remarks to the subject of *quo warranto* jurisdiction, as it affects public offices, we would say that we think the supreme court has ample jurisdiction to oust any person from office who is holding the same without any sufficient right thereto; and this, *whether the office has been usurped, or whether the incumbent's term of office has expired by lapse of time, or whether the incumbent has forfeited his right to hold the office any longer on account of some official misconduct on his part.* And we think the court has jurisdiction to so oust the incumbent from office where he is holding the same without right, although the question of his right to hold the office or the question of forfeiture, if that is the case, has never before been presented to any court for judicial determination. This court may determine the question of right or the question of forfeiture for itself (State v. Allen, *supra*; State v. Graham, *supra*; Com. v. Walter, 83 Pa. St. 105); *but of course before this court can oust an officer from his office, it must be judicially determined that he has no right to hold the same.* And if the alleged ground for ousting the officer is that he has forfeited his office by reason of certain acts or omissions on his part, it must then be judicially determined, before the officer is ousted, that these acts or omissions *ipso facto* and of themselves work a forfeiture of the office. Mere misconduct, if it does not of itself work a forfeiture, is not sufficient. Cleaver v. Com., 34 Pa. St. 283; Brady v. Howe, 50 Miss. 624, 625; Lord Bruce's Case, 2 Stra. (K. B.) 819; The King v. Ponsonby, 1 Ves. Jr. (Ch.) 1, 7; People v. Whitcomb, 55 Ill. 172, 176; High Ex. Rem., § 618. The court has no power to create a forfeiture, and no power to declare a forfeiture where

none already exists. The forfeiture must exist in fact before the proceeding in *quo warranto* is commenced. See authorities above cited and *State v. Hixon*, 27 Ark. 398, 402. There may also be cases where this court would not exercise jurisdiction, as where the question of forfeiture is at the same time being litigated in some other court of competent jurisdiction, or where some other plain and adequate remedy exists. And the court may also, in some cases, have a discretion as to whether it will exercise its jurisdiction or not. We shall have more to say hereafter with reference to these questions.

In the present case it is admitted that the defendant is eligible to hold the office of mayor; that he was duly elected thereto, or rather that he was duly re-elected thereto, in April, 1883; that he immediately afterwards qualified and took possession of the office, and is now in the full possession of the same and holding the same. But it is alleged that between April 10, 1883, and June 1, 1883, the time when the present action was commenced, the defendant was guilty of various acts and omissions by reason of which he has forfeited the office. Now, if it is really true that the defendant has forfeited his office, then it will be the duty of this court to oust him therefrom; or, at least, unless some other plain and adequate remedy exists. But the question arises, has he forfeited his office? For, as before stated, unless these acts and omissions *ipso facto* create a forfeiture, this court has no jurisdiction in *quo warranto*, or in any other proceeding to oust the defendant from his office. It makes no difference whether the defendant has done right or wrong, for as before stated, unless his acts and omissions work a forfeiture, this court has no power to oust him. The statutes of Kansas (§ 78 of the first class city act) provides that the mayor, police judge and councilmen" shall hold their offices for two years, and until their successors are elected and qualified;" and, of course they will hold their offices for that period of time, unless the offices become vacant through and in pursuance of some provision of the law. Now, there are various provisions of law with reference to vacancies occurring by reason of death, resignation, removal from the place where the office is to be held, removal from office by a motion and removal from office on the grounds of misconduct working a forfeiture. With reference to removal from office by a motion, or on the ground of misconduct working a forfeiture, counsel for the defendant cites the following statutes:—§ 11, subd. 36, and §§ 99 and 104, of the first class city act, Laws 1881, c. 37, § 213, in connection with §§ 207, 208 and 209 of the act relating to crimes and punishments, (Comp. Laws 1879, c. 31;) and § 12 of the prohibitory liquor law of 1881, (Laws 1881, c. 128).

Counsel for the defendant claim that these sections apply to the mayor as well as the other officers, except section 12. Counsel for

the plaintiff admit this, except that they make the further claim that said section 11, subd. 36, does not apply to the mayor. Now, whether it does or not, we think it is clear that the defendant has not forfeited his office under it. And, indeed we do not think that the defendant has forfeited his office under any of the foregoing sections, or under any other section of the laws of the state of Kansas. Said section 99 has no application to this case, for the reason that the defendant is not charged with any of the wrongful acts or omissions mentioned in that section. Under sections 104 and 213, before the defendant can be held to have forfeited his office, he must not only have committed the misconduct therein referred to, but he must also be tried before a criminal court, where he must be proved to be guilty beyond all reasonable doubt and must be found guilty and sentenced; and the forfeiture of his office will then follow from such prosecution, trial, conviction and sentence, and as a part of the punishment for the misconduct of which he is found guilty. *Quo warranto*, as will be remembered, is, so far at least as its procedure is concerned, a civil action (Civil Code, § 652; High Ex. Rem., §§ 591, 603); and in such an action all the evidence that is required to prove any particular fact is a bare preponderance of the evidence. This is not so in a criminal action. Besides in a criminal action all the plea that is necessary on the part of the defendant is the oral plea "not guilty". It is very different from this in *quo warranto* proceedings. From this it will clearly appear that the two kinds of actions should not be confounded and the one used in the place of the other. If the state does not choose to prosecute the defendant criminally, it waives the forfeiture and the incumbent continues to hold the office rightfully. And forfeiture for unimportant official wrongs is often waived. But even where the wrongs are of such magnitude that the state does not choose to waive the forfeiture for them, or the prosecution for them, but prosecutes the defendant criminally for them, still, his office is not in fact forfeited unless the jury trying him can be convinced beyond a reasonable doubt that the defendant is guilty. Now, there is no pretense that in the present case the defendant has ever been prosecuted or convicted for any of the wrongs charged against him in the present case. Upon this point see *Brady v. Howe*, *supra*; *The King v. Ponsonby*, 1 Ves. Jr. (Ch.) 7, 8, and 9; *State v. Hixon*, 27 Ark. 402. All that we have said with respect to misconduct under sections 104 and 213, and forfeiture of office for such misconduct, will apply with equal force under section 12 of the prohibitory liquor law; and in addition thereto we might also say that said section 12 does not seem to include the mayor. There is in fact no statute that provides that the mayor shall forfeit his office *ipso facto* by reason of any act or omission of his similar to those charged in the present case; but something else must be done before the office is, in fact, forfeited. And we think that no

decision can be found holding that a forfeiture of office may be declared in a proceeding in *quo warranto*, on account of some act or omission, because merely some statute provides that the office shall be forfeited upon a conviction of the incumbent in a criminal prosecution for such act or omission. It is certainly true that the legislature may provide for a forfeiture of office for misconduct, independent of any criminal prosecution or any prosecution for the same (*State v. Allen*, 5 Kan. 214; *Com. v. Allen*, 70 Pa. St. 445; *People v. Heaton*, 77 N. Car. 18; *Com. v. Walter*, 83 Pa. St. 105); and the legislature often does provide for such forfeitures; but it has not done so in the present case. In the present case the legislature has provided that the forfeiture shall follow the criminal prosecution, the conviction and the sentence and it cannot come before.

Counsel for the plaintiff, however, claim that the defendant has forfeited his office by reason of the rules of the common law. Now, we suppose that if the defendant has in fact forfeited his office under any law, whether it be under some statutory provision or under the provisions of the common law, he may be ousted from his office by this court, and in this kind of proceeding; or, at least if there is no other adequate remedy. The defendant, however, claims that he has not forfeited his office under any law; and he further claims that in view of the law and statutes, he could not forfeit it under the common law. Here, and upon this last proposition, is where the principal difference between the counsel for the plaintiff and the counsel for the defendant arises. We shall now proceed to consider this question.

Counsel for the plaintiff claim that at common law, whenever an officer was guilty of an official misconduct he immediately forfeited his office, and that *quo warranto* would immediately lie to oust him therefrom. Now, suppose that this is true; then can the common law apply to proceedings in *quo warranto* in this state, notwithstanding the statutes, notwithstanding the difference between the institutions of this country and those of England, and notwithstanding the differences in the tenures by which offices are held in this country and in England? But we do not think the proposition, stated as broadly as it is by the counsel for the plaintiff, is true. In many cases of official misconduct, in England, *quo warranto* would not lie. The proceeding was largely in the discretion of the court to which the application was made, and where the misconduct was unimportant, or the offense trivial, or where there was some other plain and adequate remedy, the courts, would seldom if ever, entertain the jurisdiction. We shall discuss these matters more in detail hereafter. (The court, after examining the Kansas statutes relating to the forfeiture of public offices, and holding that they cover

the subject to the total exclusion of any common law rules, continues):

Mr. High in his work on Extraordinary Remedies, lays down the doctrine that generally *quo warranto* will not lie where there is any other plain and adequate remedy. High Ex. Rem., §§ 617, 616, 618, 637, 643, 645. Counsel for plaintiff however, claim that, Mr. High is mistaken; but after a careful and pretty thorough examination of the authorities, we are satisfied that Mr. High's statement of the rule is substantially correct. State v. Marlow, 15 Ohio St. 114; State v. Taylo, *id.* 137; State v. Hixon, *supra*; Com. v. Leech, 44 Pa. St. 332; People v. Hillsdale, etc., Turnpike Co., 2 Johns. (N. Y.) 190; Neely v. Wadkins, 1 Rich Law. (S. Car.) 42; Lord Bruce's Case, *supra*; The King v. Ponsonby, *supra*; The King v. Heaven, 2 T. R. (K. B.) 772, 776. In Lord Bruce's case, the court say:—"If it is an actual forfeiture he is out, and you may choose another; if not, it is but a misdemeanor, and a *quo warranto* will not lie. Besides the modern opinion has been that the power of amotion is incident to the corporation." In the case of the King v. Ponsonby, which in the lower court was a proceeding in *quo warranto* against a person holding the office of free burgess of the corporation of Newtown, charging him with having usurped the office, it was held that the power of amotion had been expressly granted to the corporation, and therefore that *quo warranto* would not lie against a member until such power of amotion had been exercised. In the case of the King v. Heaven, it was said by ASHURST, J., "Whenever a person has once been duly elected into a corporate office and forfeits it by misconduct, his amotion by the corporation is a previous and necessary step to be taken before this court will grant an information in the nature of *quo warranto* against him; for when a person once neglects the duties of his office the corporation should first take cognizance of it and deprive him, and then it may properly be brought into this court". The case was decided in accordance with this opinion. These three English cases last cited were with reference to officers of municipal corporations. The American authorities also seem to sustain the doctrine enunciated by Mr. High. After an examination of the authorities we have arrived at the conclusion that, as a general rule, a court having the power to exercise jurisdiction in *quo warranto* proceedings will not exercise its jurisdiction where any other plain and adequate remedy exists. This we think, was always the law.

Now in the present case there [are] several remedies, some of which at least are adequate: First, there is the remedy of removal or amotion, under section 11, subd. 36, of the first class city act; second, there is a remedy of removal given for certain misconduct, under § 99 of the first class city act, though this remedy is really not applicable to the present case; third, there is the remedy by criminal

prosecution and removal, under § 104 of the first class city act, which remedy is applicable to this case; fourth, there is the remedy by criminal prosecution and forfeiture, under § 213, in connection with §§ 207, 208 and 209, of the act relating to crimes and punishments, which remedy is also applicable to this case; there is also the remedy of a removal by an election by the people every two years; sixth, and there are various other remedies for misconduct in office by fine and imprisonment, under various criminal statutes of the state; but if none of these remedies are sufficient, and if this court may take the jurisdiction of this case notwithstanding the various statutes seemingly against it, and may oust the defendant from his office in this action, then every other officer of the state, who may be guilty of misconduct in office, may also be ousted from his office by this court, notwithstanding all the other remedies of ouster and removal and fine and imprisonment and notwithstanding all the various statutes of the state seemingly adverse to such a thing, and whose plain inferences and necessary implications, if not their express provisions, are clearly against the exercise of such jurisdiction. Thus, a street commissioner of Baxter Springs, or a road overseer of Rawlins County, or a school director of Finney County, or a township trustee of Doniphan county, might be ousted from his office by the supreme court, notwithstanding all the laws seemingly against it, and notwithstanding all the difficulties and inconveniences that might ensue in the prosecution of parties at such great distances from their homes. It must be remembered that this court has just as much jurisdiction over the most remote part of the state as it has over the city of Topeka.

After a careful consideration of this case, we have come to the conclusion that the plaintiff's petition does not state a cause of action within the jurisdiction of this court, and therefore the demurrer to the petition will be sustained, and judgment rendered accordingly.

All the justices concurring.

SNOWBALL V. PEOPLE EX REL. GRUPE.

1893. SUPREME COURT OF ILLINOIS. 147 Ill. 260, 35 N. E. 538.

QUO WARRANTO proceedings by the people, on the relation of William Grupe, against John W. Snowball. There was judgment of ouster, which was affirmed by the appellate court. Defendant brings error. Affirmed.

MAGRUDER, J. Two questions are presented for consideration: First, whether the court below had jurisdiction to try the appel-

lant's right to the office in a proceeding by *quo warranto*; second, whether the poll established at the Allerton House, can be regarded as a legally authorized voting place.

1. Did the city court have jurisdiction to entertain the present proceeding? As it is assumed by both parties that the city court has the same jurisdiction in the matter as the circuit court would have under the same circumstances, we shall treat the case as though it had been begun in the circuit court. *Baker v. Rockabrand*, 118 Ill. 365, 8 N. E. 456. The point made by counsel for the appellant is that this is a mere election contest, and that under our statutes such contests can only be determined by the county court, and not by the circuit court in a *quo warranto* proceeding. The election law after providing for determining election contests in reference to certain special officials, not including members of boards of education, provides, in § 98, that the "county court shall hear and determine contests of election of all other county, township and precinct officers and all other officers for the contesting of whose election no provision is made." I Starr & C. Ann. Stat., p. 1017, ch. 46, § 9, 8 Rev. Stat., § 13, art. 3 of the act of May 21, 1889, "to establish and maintain a system of free schools", provides that, at any school election held under the act, "the manner of contesting said election shall be the same as prescribed by the general election laws of this state defining the manner of electing magistrates and constables, so far as applicable, subject to the provisions of this act".

In construing these sections of the election and school laws, we have held that school officers are of the same class as county, township, and precinct officers, and that, therefore, the county court is vested with jurisdiction to try and determine contested elections of school officers. *Misch v. Russell*, 136 Ill. 22, 26 N. E. 528. But we have been referred to no case in this state where it has been held that the county court has exclusive jurisdiction in such matters. There seems to be some disagreement among the authorities on the question whether proceedings by information in the nature of *quo warranto* are excluded, where a statute prescribed a specific mode for contesting elections, and designates a particular tribunal for determining such contests. It has been held in Ohio and Pennsylvania, and perhaps in some other states, that where a specific mode for contesting elections has been prescribed by statute, that mode alone can be resorted to, and that the common law mode of proceeding by *quo warranto*, will not be entertained. *State v. Marlow*, 15 Ohio St. 114; *Com. v. Leach*, 44 Pa. St. 332; *High Ex. Rem.*, § 617. It will be found upon examination that the decisions which thus hold are based upon peculiar statutory and constitutional provisions, which do not exist in this state. *People v. Hall*, 80 N. Y. 117. But, independently of such provisions, the weight of authority is in favor of the position that the special remedy given by statute in

such cases is merely cumulative and not exclusive of the remedy by quo warranto. The general principle is that, in the absence of any controlling constitutional restrictions upon the subject, the jurisdiction of the courts to proceed by information in the nature of *quo warranto* is not taken away by a statute which prescribes a special proceeding, unless there are express words in the statute itself taking away such jurisdiction, or unless it appears to have been the manifest intention of the legislature to confine the remedy to the prescribed proceeding and to the designated tribunal. 1 Dillon Mun. Cor. (4th ed.), § 202, (141,) and notes. We have been referred to no language in the election law of this state which, either in terms or by necessary implication, expresses a legislative purpose to deprive the circuit courts of their *quo warranto* jurisdiction. Section 12 of article 6 of the present constitution of the state provides that "the circuit courts shall have original jurisdiction in all cases in law and equity". As *quo warranto* is a common law remedy, the circuit courts are vested by the organic law with the power to entertain it. *People v. Hall, supra*; *Kane v. People*, 4 Neb. 509. In addition to this, the "Act to revise the law in relation to *quo warranto*" provides that a petition for leave to file an information in the nature of a *quo warranto* in the name of the people of the state may be presented to "any court of record of competent jurisdiction", in case "any person shall usurp, intrude into, or unlawfully hold or execute any office". 2 Starr & C. Ann. Stat., p. 1871.

In the present case, the seven votes cast for the appellant at the Allerton House gave him his majority, and without them he would not have been elected. While the officer who holds the certificate of election from the canvassing board has a *prima facie* title, yet he is certainly not entitled to the office if he did not receive a majority of the legal votes cast at the election. It is the right of the people to go behind the certificate, and determine whether the holder of it is rightfully in office. 2 Dillon Mun. Cor. (4th ed.), § 892 (716). The true view to take of the subject is that the proceeding by *quo warranto* is not strictly an election contest between two persons claiming the same office. "*That proceeding only determines that the person holding the office is or is not an usurper. But, ousting him, if the court finds against him, it adjudges the right to the office to no one*". *People v. Londoner*, 13 Colo. 303, 22 Pac. 764; *State v. Francis*, 88 Mo. 557. Under our form of government all power emanates from the people. The right to inquire into the authority by which any person assumes to exercise the functions of a public office or franchise belongs to the people, as a part of their sovereignty. In the *quo warranto* proceedings the people are the plaintiffs, whether upon the relation of a third person, or not. The rule that where a new right, and a remedy for its invasion, are comprised in the same statute, parties injured are confined to the statutory re-

dress, does not apply to the people. *People v. Hall, supra*; *Dudley v. Mayhew*, 3 N. Y. 9. Because the statute provides a mode of contesting elections in the county court, it does not follow that the people, in their sovereign capacity, are thereby precluded from inquiring by information in the nature of a *quo warranto* into usurpations of office. "The two remedies are distinct; the one belonging to the elector in his individual capacity, as a power granted, and the other to the people in the right of their sovereignty." *People v. Holden*, 28 Cal. 123. This right of the people is not "in any manner impaired by statutes granting to electors in their private capacity as citizens, the right to contest the election of any person assuming to exercise the functions of an office." High Ex. Rem. (2nd ed.) 624; *McCrary Elec.* (3d. ed.), § 360; *Cooley, Const. Lim.* (6th ed.), p. 785, and note 1; *Com. v. Allen*, 70 Pa. St. 465; *People v. Londoner, supra*; and cases cited; *People v. Bird*, 20 Ill. App. 568; *State v. Fitzgerald*, 44 Mo. 425; *Kane v. People, supra*; *Linegar v. Rittenhouse*, 94 Ill. 208; *State v. Funck*, 17 Iowa 365; *Cheshire v. People*, 116 Ill. 493, 6 N. E. 486; *People v. Hall, supra*. We are of the opinion that the court below had jurisdiction to entertain the present proceeding.

The judgment of the appellate court is affirmed on other grounds.

See also, *Tarbox v. Sughrue*, 36 Kan. 225; *Kane v. People*, 4 Neb. 509; *People v. Holden*, 28 Cal. 123; *State v. Funck*, 17 Ia. 365; *Wammack v. Holloway*, 2 Ala. 31; *People v. Bird*, 20 Ill. App. 368; *State v. Shay*, 101 Ind. 36; *People v. Thompson*, 21 Wend. (N. Y.) 235; *State v. Equitable Loan, etc., Assn.*, 142 Mo. 325, 337; *Convery v. Conger*, 53 N. J. L. 658; *State v. Baker*, 38 Wis. 71, 80.

Contra: Holding that where the statute provides a remedy, same is exclusive. *Reg. v. Morton, L. R.* (1892), 1 Q. B. 39; *State v. Gates*, 35 Minn. 385; *Parks v. State*, 100 Ala. 634; *People v. Every*, 38 Mich. 405; *State v. Taylor*, 15 Oh. St. 137; *Darrow v. People*, 8 Colo. 417; *Seay v. Hunt*, 55 Tex. 545; *State v. Tomlinson*, 20 Kan. 692; *Commonwealth v. Garrigues*, 28 Pa. St. 9.

7. Not to be employed to test the legality of acts.

PEOPLE EX REL. FARRINGTON ET AL. V. WHITCOMBE ET AL.

1870. SUPREME COURT OF ILLINOIS. 55 Ill. 172.

MR. JUSTICE WALKER delivered the opinion of the court.

This was an information in the nature of a *quo warranto*, filed by Addison Farrington, and a number of other persons, in the Whiteside Circuit Court, at the May Term, 1869, against Geo. A. Whitcombe and others, who were acting as mayor and common council of the town of Morrison in that county. The information charged that the town is located on a part of section eighteen, in

township twenty-one, north of range five, east of the fourth principal meridian, and embraces within its borders about one hundred and sixty acres; that the town is and has been for a long time past, incorporated under the laws of this state; that the town had its president and trustees, and had at no times, forfeited or suspended the rights pertaining to it under the laws of its incorporation.

That the defendants had for forty days, and more, used, and are still using, without any warrant or charter, the rights, privileges and franchises of the town over the lands therein, together with other lands beyond the boundaries of the town, which are described, and which embrace about one thousand acres, against the will of the owners and inhabitants of the said territory; that the defendants are exercising the city government over such territory for the purpose of levying taxes, passing ordinances, expending money and obtaining credit in the name of the city government, and the people and the property beyond the limits of the town.

That the city proper embraces but one sixth of the territory over which defendants are exercising and claiming the right to extend the city government; that the remainder of the territory is agricultural or farming lands, and is occupied and used by the owners thereof exclusively for that purpose; that there are within the territory twelve improved farms, over which the defendants were attempting to establish and set up and establish the city government.

The petition contains a prayer that the defendants be required to answer, and show by what authority, warrant and claim, they have used and enjoyed the liberties, privileges and franchises of the city.

The defendants filed an answer, setting up, that by an act of the general assembly of the state, approved on the twenty-third of February, 1869, entitled "an act to incorporate the city of Morrison" which is set out, and confers the powers necessary to a city government, and authorizes the levy and collection of taxes to defray the expenses arising from the administration thereof; that under the provisions of the act they were duly elected, Whitcombe, mayor, and the others, members of the common council, and that by virtue of the city charter and such election, they were exercising the powers of the city government within the limits prescribed by the charter.

To this answer relators filed a general demurrer, which, on a hearing, was overruled, and judgment for costs rendered against them. To reverse that judgment, relators bring the record to this court, and assign for error the overruling of the demurrer, and rendering judgment against them for the costs.

The question sought to be raised by the information in this case, is, whether the city officers can extend the city government beyond the original limits of the town, and can levy taxes and enforce ordinances in the portion of territory annexed by the act of February 23, 1869, and which is used exclusively for agricultural purposes,

and whether that act is not unconstitutional and void. The demurrer to the answer of the respondents brought the whole record, as well the information as the answer, before the court to determine its sufficiency. The first question presented by the demurrer is, whether the remedy, if any exists, has not been misconceived; whether the question of power to extend the city government over this territory thus annexed can be raised by *quo warranto*.

This writ is generally employed to try the right a person claims to an office, *and not to test the legality of his acts*. If an officer threatens to exercise power not conferred upon the office, or to exercise the powers of his office in a territory or jurisdiction within which he is not authorized to act, persons feeling themselves aggrieved may usually restrain the act by injunction. The case of the Attorney General v. Supervisors, 11 Mich. 63, was a bill filed to restrain the county authorities from unlawfully removing a county seat, and an injunction was granted. But that case does not hold that the act could have been prevented by an information in the nature of a *quo warranto*.

The case of the People v. Maynard, 15 Mich. 463, was such an information, but it questioned the right of the officer to act as treasurer, in a county. He claimed that by the formation of a new county, the residence of the treasurer of the original county being embraced in the new county, the office had become vacant, and that he was appointed treasurer to fill the vacancy. But it was held that the law which purported to create the new county was unconstitutional, and that the office of treasurer, had not become vacant, and hence respondent had not been legally appointed and did not hold the office or any title to it. The proceeding was instituted alone to try the question whether he was an officer, and not whether his official acts should be confined to a special locality. It is true that the solution of the question whether he was legally treasurer depended upon the validity of the law intended to create the new county. But it does not follow, because the question whether a law is constitutional may arise in determining whether a person is legally in office, that this proceeding may be resorted to for the purpose of determining whether a law is invalid.

In this case, there seems to be no question that defendants in error are legally and properly officers of the city, and there can be as little doubt that they may perform all the functions of their offices within the city limits, whatever they may be. If they attempt to pass and enforce ordinances beyond the bounds of the city, or to levy and collect taxes beyond the city limits, such acts would be unauthorized, and might, no doubt, be restrained, on a bill properly framed for that purpose. But whether a law which purports to attach this territory to the original corporate limits is or is not constitutional, cannot be determined in such a proceeding as this. If

the corporate authorities shall attempt to enforce their ordinances against persons in the territory thus annexed, they may raise the question of the validity of the law on their defense, or if they shall levy and attempt to collect taxes on the lands embraced in the portions used for agricultural purposes, the tax payers might, no doubt, file a bill to restrain their collection, and thus present the question whether the law is valid and binding.

Nor can it be said that defendants in error have waived the right to raise the question whether this proceeding will lie, as an issue of fact was not formed or a trial had. The whole record was before the court below for inspection on the demurrer, and as relators had failed to show that they were entitled to relief in the mode adopted, the court could not do otherwise than sustain the demurrer to the information, and there is, therefore, no error in the judgment of the circuit court. When the question sought to be raised shall be properly presented, it will receive the consideration which its gravity demands. The judgment of the court below must be affirmed.

Judgment affirmed.

UPDEGRAFF ET AL. V. CRANS.

1864. SUPREME COURT OF PENNSYLVANIA. 47 Pa. St. 103.

(APPELLEE filed a bill in equity to enjoin the appellants from exercising the duties of officers of the borough of Williamsport on the ground that their election was fraudulent, illegal and void. Demurrer overruled. Appeal.)

The opinion of the court was delivered by THOMPSON, J.

The complainant below mistook the remedy for testing the rights of the several persons claiming to be borough officers, under the appointment of the borough council, on the 15th of June last. *Quo warranto* is the specific statutory remedy for such a case. But it is alleged that the appointees had not entered upon, or exercised, or attempted to exercise, the duties of their offices when the bill was filed. If that is so, it only shows that the plaintiff moved too soon. He should have waited and if they never entered or usurped the exercise of authority under their appointments, no harm could have been done; but if they did, that moment the law would afford an ample remedy by *quo warranto* for trying their right. The specific remedy at law, ousts the equitable jurisdiction of the case. There should, therefore, have been judgment on the demurrer for the defendants, and the bill dismissed.

The decree of the common pleas is now reversed, and the bill of

complaint is dismissed at the costs of the appellee, including the costs of the appeal.

See also, *Hullman v. Honcomp*, 5 Oh. St. 237; *Osgood v. Jones*, 60 N. H. 282.

See next section, § 2, for further discussion of proper remedy where municipal corporation unlawfully exercises governmental powers over territory illegally annexed.

8. Operation of Statutes of Limitations.

STATE v. PAWTUXET TURNPIKE COMPANY.

1867. SUPREME COURT OF RHODE ISLAND. 8 R. I. 521.

THIS was an application by the defendants for a rehearing upon an information in the nature of *quo warranto*, and to set aside the judgment of forfeiture rendered at the former hearing.

The case was argued by *Edward Metcalf* for the petitioners upon the following brief.

I. The proceeding was not instituted in behalf of the state until after a lapse of over six years, and this is held by the English courts, to be a good bar to a prosecution for a forfeiture. *Angell and Ames Corp.*, § 743, p. 718-719 (7th ed. and cases there cited). It would seem that under our statutes of limitations, the right or power to interfere with corporate franchises, as claimed in this case, can hardly be an unlimited one, and if there be any limitation, that of six years would be natural and obvious.

II. The court in its opinion omits any reference to the first section of the charter of 1825. The conveyance held to be a cause of forfeiture is claimed to have been made in good faith, under express powers granted by this section. Applying the very language of the opinion vindicating the neglect to make annual election, of corporate officers, the act condemned by the court would seem to be equally justifiable under the charter. And if the charter does not confer power to make such a grant, or conveyance, would not the proper remedy be to avoid the conveyance, and leave the corporation still bound to maintain that portion of its road which it had attempted to convey?

III. But this conveyance if binding on the corporation, is not necessarily a cause of forfeiture. The cases cited by the court go to show that there must either be a wilful abuse of corporate powers, a gross neglect of duties, or an irremediable injury to the public, to warrant so extreme a measure as the forfeiture of corporate franchises. See the general doctrine stated and illustrated in *Angell and Ames Corp.*, § 776, pp. 760 to 762. In the language of Chief

Justice Nelson cited by the court (23 Wend. 211), "A substantial compliance, according to the terms of the charter, is all that is required."

IV. The defendants know of no case in point, but think it may be safely asserted that the power to declare a charter forfeited has never been exercised under similar circumstances. The facts submitted to the jury, their verdict and the opinion of the court, taken together show, 1, that the conveyance in question was made in the exercise of a power given by charter; 2, that no neglect of duty by the corporation is charged or implied; 3, that instead of working an injury to the public or to individuals, the conveyance in question was made for the manifest convenience and benefit of the public and of individuals, and at the earnest solicitation of the town of Cranston, which accepted the conveyance, and which in this matter is the sole representative of the public convenience and interests.

Charles H. Parkhurst, for the *Attorney General*, in behalf of the state, argued against the petition upon the following brief:—

The ground upon which the charter was declared forfeited was that the defendant corporation did, in the year 1855, sell to the town of Cranston a portion of their road, and that since that time it has ceased to keep that portion of said road in repair.

I. This is clearly an act which said corporation could not rightfully do under its charter. It is of itself a deliberate act of wilful misfeasance, which is a sufficient cause for the forfeiture of its charter. Prior to this sale, whenever any corporation wished to convey a portion of their road, they asked authority from the state, which had a reversionary interest in the road under the charter. This assent was granted upon such restrictions as were necessary to protect the interests of those living adjoining the part conveyed, and the public interests also. See Schedules, January Session, 1847, p. 45.

II. By the terms of the charter providing for the vesting of the road in a certain contingency in the state, said road became, of necessity, inalienable estate, in whole, or in part, without the express assent of the legislature. See Schedules, January Session, 1825, p. 27.

III. There has been no waiver of its reversion by the state. The Statute of Limitations does not run against the state so as to bar it from asserting its claims to the property forfeited by misuser or misfeasance, where the property belongs to the state by virtue of its sovereignty.

The opinion of the court was read by DUFFEE, J. The leading ground assigned for this application is, that the prosecution was not instituted in behalf of the state until after a lapse of over six years from the happening of the cause of forfeiture; and we are referred to Angell & Ames Corp. (7th ed.), § 743, and the cases there cited,

as showing that after the lapse of so long a time, we ought not to entertain the proceeding. The cases cited in Angell & Ames show that the English rule is, not to allow an information in the nature of a *quo warranto* to be filed, *at the instance of a private individual*, for the purpose of impeaching the title to a corporate office or franchise, where the same has been held or exercised without complaint for more than six years from the time of the alleged usurpation. An information in the nature of *quo warranto* cannot be filed by a private individual without leave, which the court may at its discretion, either grant or refuse. To regulate their discretion, as affected by lapse of time, the English courts adopted the rules which we have stated. *But the Attorney General, representing the Crown in England and the State in this country may file an information in the nature of a quo warranto, without leave according to his own discretion; and we find no English law which holds that an information, so filed, can be barred by the lapse of six years independently of any statute to that effect.* On the contrary, in the leading case of *Rex v. Wardroper*, 4 Burr. (K. B.) 1963, where, after a lapse of nineteen years, the court refused leave to file an information, the judges were careful to express a reservation in favor of the crown, and said: "Indeed, no length of usurpation, shall affect the crown, *nullus tempus occurrit regi.*" The only case which we find that claims a discretion for the court, in this regard, over an information filed by the attorney general, is the *People v. Bank*, 1 Dougl. Mich.) 285: The court in that case do not profess to follow any precedent, but stand on their own opinion of what is salutary and reasonable. We think the case of *Rex v. Wardroper* declares the sounder doctrine. The attorney general being a *public* officer, may be presumed to be capable of a salutary and reasonable discretion, as well as the court, and when, acting in behalf of the state, he deems it his duty to prosecute for a forfeiture, it is not for the court, in the absence of any statutory limitation, to say he is too late. Indeed this court has itself decided that, *after the information has once been filed, its discretion ceases*, and it has then nothing to do but administer the law the same as in any other case. *State v. Brown*, 5 R. I. 1.

In this case, moreover, the attorney general is acting not only on his own discretion, but also under a resolution of the general assembly authorizing the proceeding, which gives additional strength to the reason why the court should allow the prosecutions to go on, notwithstanding the lapse of time.

The ground upon which the court have decreed a forfeiture in this case is, that the defendant corporation did, in the year 1855, sell and convey to the town of Cranston a portion of their road, and that since then they have ceased to keep that portion of the road in repair. The counsel for the corporation claims, as another reason for a rehearing, that under the first section of their charter, the

corporation had the right to make such sale and conveyance, and that the attention of the court was not directed to this provision at a former hearing. The first section of the charter gives a name to the corporation, and provides that by that name they "shall be and are hereby made able and capable in law, as a body corporate, to purchase, possess, have and enjoy to themselves, their successors and assigns, lands not exceeding fifty acres, tenements, rents, tolls and effects of what kind and nature soever, and the same to grant, sell or dispose of by deed or deeds at their own will and pleasure." This section confers the right which is claimed for the corporation, if the road itself was intended to be included in the fifty acres there mentioned. Subsequent provisions of the charter show that this could not have been intended. The second section prescribes that the road, to be made and maintained by the corporation, shall be three rods wide, and shall commence and terminate at certain points, pursuing a certain direction. The eleventh section provides that when the earnings of the road shall amount to enough to pay for what the road cost, together with the expense of maintaining and keeping it in repair, and twelve per cent. per annum in interest thereon, the corporation shall be dissolved, and the road aforesaid vested in the state. These two sections are inconsistent with a right to sell and convey the road; for after a sale and conveyance legally made, the road could no longer be maintained by the corporation nor vest in the state. The fifty acres mentioned in the first section must therefore be construed to mean fifty acres in addition to the land on which the road is made—a construction which the more readily suggests itself from the fact, that a special mode is provided for the acquisition of the land to be used for the road.

We have also been referred to a statute, passed in 1864, authorizing turnpike corporations to transfer their roads to the towns where they are located, for public highways, and have been asked to infer from thence that the transfer by this corporation of a portion of its road for such a purpose is no ground of forfeiture. The statute is not retrospective in its terms, and it does not purport to be declaratory merely of existing laws. It initiates a new policy; but, while it may afford reason, appealing to the attorney general or the legislature, for not prosecuting this corporation for having done what this and every other turnpike corporation in the state are now permitted to do, we do not see how it gives us any right to declare the law, as applicable to an act done in 1855, to be any otherwise than it was before the enactment of the statute.

The counsel for the corporation also presses upon the court, again, the arguments which were urged at a former hearing. We, however, see no sufficient reason for changing the opinion then expressed, and must, therefore, dismiss the application.

See also *People v. Pullman, etc., Co.*, 175 Ill. 125; *Commonwealth v. Allen*, 128 Mass. 308; *State v. Buckley*, 60 Oh. St. 273; *People v. Stanford*, 77 Cal. 360.

In *People v. Boyd*, 132 Ill. 60, an endeavor is made to distinguish between those cases where the object is to enforce a private (?) right and those wherein a public right alone is involved.

The state may be barred by its own laches and acquiescence.—*Commonwealth v. Bala, etc., Co.*, 153 Pa. St. 47; *State v. Gordon*, 87 Ind. 171; *State v. Town of Westport*, 116 Mo. 582, 593; *State v. Bailey*, 19 Ind. 452; *People v. Maynard*, 15 Mich. 463; *State v. Sharp*, 27 Minn. 38.

Acquiescence by the relator or participation in the acts complained of or laches will estop.—*Reg. v. Anderson*, 2 Q. B. 740, 42 E. C. L. 891; *Dorsey v. Ansley*, 72 Ga. 460; *Guzman v. Walker*, 11 La. Ann. 693; *Maddox v. York*, 21 Tex. Civ. App. 622; *Terhune v. Potts*, 47 N. J. L. 218; *People v. Schnepf*, 179 Ill. 305; *Cate v. Turber*, 56 N. H. 224.

9. Discretion of court in refusing or granting the writ.

REX v. EDWIN WARDROPER.

1766. COURT OF KING'S BENCH, ENGLAND. 4 Burr. (K. B.) 1963.

Two days after such declaration made by the court, as above, there came before them several of these "to show cause why informations in nature of *quo warranto* should not be granted against the several defendants claiming rights as corporators of Winchelsea".

One of the principal of them was this Edwin Wardroper. The length of possession of their respective corporate offices were (as has been said before) very different; some, above twenty years; some under. Wardroper's possession was of the length of nineteen years and eight months, after a re-election (which re-election had been made for greater caution); and of twenty-seven years from his original election. The objection to him was *non resiancy* sworn against him to the belief of three persons who made the affidavits. But he produced positive and full affidavits to the contrary; and he shewed that the makers of the affidavits had voted for him and had concurred with his acting in this his corporate office, upon many occasions; and never before objected to the legality of his right. He also swore that he had paid scot and lot. Whereupon

Sir Fletcher Norton, on behalf of the defendant, prayed that the rule might be discharged with costs.

Mr. Harvey, Mr. Kemp, Mr. Walker, and Mr. Dunning, insisted that the question turned upon this—"What was a *real*; what, a *colourable* residence?" and this they said *ought* to be tried by a *jury*, not upon *affidavit*; especially in a case like this, where there is no danger of the dissolution of the corporation.

Lord Mansfield mentioned the case of Sir William Trelawney

who was steward of the borough, at the time of his election to be a capital burgess of West Loe. And the court discharged the rule obtained against him, without sending the question to a jury.

The statute of 9 Anne, ch. 20, had a view to the speedy justice to be done against usurpers of office in corporations, as well as to quiet the title of those who had right. And that act does not leave it to the discretion of the officer, as it was before; but puts it in the discretion of the court. Therefore the court must exercise a discretion. It would be very grievous that the information should go of course; and it would be a breach of trust in the court, to grant it as of course. On the contrary the court are to *exercise a sound discretion* upon the particular circumstances of every case. Now here is no fact sworn to impeach the defendant's right. Therefore the court, if it had been nicely attended to, ought not indeed to have granted the rule. As to the residence of the defendant, nothing more than apprehension and belief "that he was not resident" are sworn to; no fact. But the defendant swears positively to the fact, "that he was resident at the time"; and swears to a re-election, made upon a doubt of his former election; which is a fact of notoriety in the place, and a circumstance leading to believe that he was resident at this re-election. And these very persons who now make the affidavits against him, voted at his election; and they have voted with him at other elections. His re-election is above nineteen years ago; and many others claim under his rights.

Therefore, on the merits of this rule alone, independently, I think it ought to be discharged with costs, for the misbehavior of the parties applying for it. But if it shall appear that there is misbehavior on both sides, it may be a different consideration, as to the costs.

The three other judges concurred to discharge the rule with costs. They said, they ought not to encourage vexatious prosecutions, which tend to throw corporations into confusion. Here is a long acquiescence; though not indeed twenty years *quite*; and the defendant is now attacked without sufficient grounds. The very persons who now object to him, have themselves voted for him, and concurred with him in his acts as a corporate officer. Their conduct therefore gives the lie to their complaint.

Here is a sufficient residence proved; and he bore the burdens of the corporation, and paid scot and lot which must have been notorious.

This is a hardened, as well as a groundless application; and if the court were to make this rule absolute, they would act contrary to the words and spirit of 9 Anne, ch. 20, which intended to quiet the possession of such as had a right, as well as for the speedy removal of usurpers.

Indeed, no length of usurpation shall affect the crown; *nullus in tempus occurrit regi*. The King will not be bound by our discharge.

ing the rule: *the crown may still bring a quo warranto*. But we are to exercise a just discretion, and not to promote vexation.

The court were most clear and unanimous in their opinion "that the rule ought to be discharged". And as the application was so very unreasonable and groundless, they thought that the case of New Radnor (*ante Vol. I, p. 580, Rex versus Lewis*) would warrant their discharging it with costs. Therefore

Per Cur. unanimously.—

Rule discharged *with costs*.

LYNCH v. MARTIN.

1881. SUPERIOR COURT OF DELAWARE. 6 Houst. (Del.) 487.

(APPLICATION by Lynch, who was a candidate for the office of sheriff, against Martin, who had been declared elected to said office and was in possession thereof, for an order to show cause why an information in the nature of a *quo warranto* should not be filed against the respondent, and a writ issued requiring him to show by what warrant he holds said office. The application was supported by affidavits.)

(Opinion of COMEGYS, C. J., omitted and also so much of the opinion of HOUSTON, J., as relates to the affidavits filed.)

HOUSTON, J.—The ancient writ of *quo warranto* for which an information in the nature of the writ seems to have become at an early period the general substitute, was a high prerogative writ in the nature of a writ of right for the king in the country from which we have derived it, against one who had usurped or claimed any office, franchise or liberty of the crown, to inquire by what authority he supported his claim to it, in order to determine the right. And as such franchises, offices or liberties in their origin pertain, as high prerogative rights, to the king exclusively, and could only be held and obtained by gift or grant from him, any one in the possession of such a franchise or office was commanded by the writ to show by what authority he held or exercised it, he was, of course brought into direct conflict with the king himself before the tribunal that was to try it, as claiming a high prerogative right pertaining to the sovereign alone, and which could only vest in a subject by actual grant to him or his ancestors. And, accordingly in such a contest it was early ruled and established that it was absolutely incumbent upon the defendant in it to show to the satisfaction of the court that he had a good and valid title in law to the office or franchise in question, and if he failed to do so, it was pronounced a usurpation on the rights of the crown, and judgment of ouster was ren-

dered against him. And the courts in this country have followed this ruling quite rigidly in cases of informations in the nature of writs of *quo warranto*, although we have no crown and no king and no prerogative rights under our republican form of government and of popular elections to public offices such as the one now under consideration.

It was also at an early period equally well settled in the courts of England that an information in the nature of the writ of *quo warranto* would be granted as a matter of course whenever applied for in the proper form, but the propriety of the practice had before been questioned by Lord Mansfield and all the judges then sitting with him in the Court of King's Bench, as early as the year 1766, in the case of *Rex v. Wardoper*, 4 Burr. (K. B.) 1963, in which after referring to a previous case in which the court had discharged the rule obtained against the defendant, without sending the question to a jury, he remarked in regard to the case then before the court that "it would be very grievous that the information should go of course. And it would be a breach of trust in the court to grant it as of course; on the contrary, the court are to exercise a sound discretion upon the particular circumstances of every case". And the same court expressed the same opinion in the succeeding cases of *Rex v. Dawes*, 4 Burr. (K. B.) 2022, 2120, 2277; *Rex v. Stacey*, 1 T. R. (K. B.) 1. Some twenty years later, reaffirming the same principle, Lord Mansfield, again remarked: "I remember when it was so much the practice of the court to grant *quo warranto* informations as of course that it was held prudent never to show cause against the rule, for fear of disclosing the grounds on which the party went. But now, since these matters have come more under consideration, it is no longer a matter of course, and the court are bound to consider all the circumstances of the case before they disturb the peace and quiet of any corporation." The corporation referred to was that of the borough of Winchelsea, and the point to be considered was whether one Martin was duly elected mayor of it, on which election the validity of the defendant's franchise, as a freeman of the borough, depended; the *quo warranto* information moved against him was to show by what authority he claimed the franchise. And the ruling on this point as above stated, has been recognized and reaffirmed in all the cases of the kind which have followed it, both in that country and in this, until now it is become a settled rule and is always in the discretion of the court to grant or withhold an information of this sort in this nature, and to this end that they are bound to exercise a sound discretion upon consideration of the particular circumstances in each case. *Cole Criminal Information*, etc., 56 Law Libr. 165; *High Ex. Rem.* § 605.

It has also been decided that *when the evidence presented to the court in the affidavits for and against the rule to show cause, is*

conflicting, and is not such as to raise a fair doubt on which side the balance inclines upon the question of fact presented, the court should not grant the application, or make the rule absolute. The King v. Mein, 3 T. R. (K. B.) 596. And in a later case, Lord Kenyon states the rule on this point in still stronger terms, which was upon a rule on the defendant to show cause why an information in the nature of *quo warranto* should not be filed against him for exercising the office of bailiff of the borough of Seaford, the charter of which provided that the inhabitants and tenants residing in it should annually elect on the day stated some person from among themselves to be the bailiff of it, and the affidavits on the part of the relator stated "that the defendant was not resident in the borough at the time, of his election, as was required and made necessary by the charter, or according to the true meaning and intent of the same," which was contradicted by affidavits on behalf of the defendant to the effect that he had rented a house in the borough on the 28th day of September preceding for one year, and that he and his servant had slept in it that night, and quitted Seaford the next day after the election, but he had been there again, and resided and slept in the same house on the 23d and 24th of October last. For the relator it was argued that this was a mere colourable residence; and further that whether it was a colourable or a *bona fide* residence, was a question of fact for the consideration of the jury; and the very circumstance of its being disputed was decisive to show that the rule should be made absolute in order that the jury might determine the question. But Lord Kenyon, C. J., said "I cannot forbear reprehending the manner in which the prosecutor's case has been laid before the court; the affidavits on his part contain nothing but a loose general charge against the defendant. When Lord Mansfield first came into this court he found informations in the nature of a *quo warranto* were had almost for the asking, but he soon saw the impolicy and vexation of such a rule; and therefore before he granted any such application he canvassed the case, and unless he found strong grounds for questioning the defendant's title he (and the court sitting with him) always refused to let the information go. Such is the conduct which I am inclined to pursue; and therefore I shall consider all the circumstances of this case." The King v. Sarjeant, 5 T. R. (K. B.) 466. These cases have been followed by so many rulings to the same effect in England that Mr. Cole, an English writer of acknowledged authority on the subject, say that this is now the settled doctrine of the courts of that country. Cole Criminal Information, etc., 56 Law Libr., 165. And it also appears to have been as generally recognized in the courts of this country, among which we have a case in the time of Gibson, C. J., in Pennsylvania, in which he even likened the status of the court in such a case to that of an inquest between the accuser and

the accused; to which the inculpatory evidence should be submitted before he could be sent before a jury to be tried for the alleged usurpation. *Commonwealth v. Jones*, 12 Pa. 365.

It has also been held that to entitle a party to such an information, on the ground that the person holding the office had not been elected by a majority of the legal votes, the relator must, by affidavit, make out a *prima facie* case to the satisfaction of the court. *Rex v. Mashiter*, 6 Ad. & El. (K. B.) 153; 1 Nev. & P. (K. B.) 314; *Rex v. Sanford*, 1 Nev. & P. (K. B.) 328; and at this stage of the proceeding the court become the judges of the evidence, as well as the law in the case, and of the weight and credibility of the testimony produced before them when the affidavits filed for and against the application are contradictory in their character.

But as the counsel for the respondent, in their argument on showing cause against the rule, took the ground that inasmuch as the relator, in his affidavit to his petition and the foregoing allegations contained in it, does not swear positively and directly to the truth of these statements upon his own actual knowledge of them, but only to his belief in them, which might have been, and doubtless was, founded on information merely, it could not be considered as sufficient proof of any one of the allegations contained in it as to any of the illegal votes which he asserts were cast and counted for the respondent, his affidavit to his petition being in the following words simply:—"Before the prothonotary of this court comes Purnal J. Lynch, the petitioner above named, and being by me solemnly sworn according to law, says that what is contained in the foregoing petition, so far as concerns the deponent's act and deed, is true, and that what relates to the act and deed of any other person he believes to be true." It is apparent from the tenor of this and marked discrimination between his own act and the act of any other person referred to in it, that so much of it as relates to the act of any other person or persons is based on hearsay and information merely and it is equally as apparent that he must have received by hearsay from a number of persons present on that day in the several election districts mentioned, the information on which he rests his sworn belief that there were eighty-five illegal votes polled at them that day for the respondent. But it is not directly alleged anywhere in the petition that any of the alleged unqualified voters referred to in it voted for the respondent, but indirectly or by implication only is expressed in the allegation several times repeated in the same words, that there were so many illegal votes cast by unqualified persons in the election districts named, and that they were all counted for the respondent.

But the rule of law requires that the affidavits made in support of an application for an information in the nature of the writ of

quo warranto shall be complete and sufficient in every respect and contain positive allegations and a precise statement of the facts on which the prosecutor assails the title of the respondent to the office or franchise in question. Cole Criminal Information, etc., 178; High Ex. Leg. Rem. § 733; 3 Steph. N. P. 2460; King v. Newling, 3 T. R. (K. B.) 310; King v. Lane, 5 Barn. & Ald. (K. B.) 488; Rex v. Serjeant, 5 T. R. (K. B.) 466. And although such an affidavit to the following purport: that the deponent "understands and believes," or "has heard and believes or has been informed and believes," when it has reference to statements alleging a usurpation of the office merely, has been considered sufficient under certain circumstances, as where the usurpation was not denied by the respondent, who made no answer to the application, the rule is otherwise when the allegations go to the validity of the title of the respondent to the office in question. Rex v. Harwood, 2 East (K. B.) 177; Rex v. Blythe, 6 B. & C. (K. B.) 240. And as in this case the allegations in the petition and affidavit of the relator go directly to the validity of the title of the respondent to the office in controversy, and there having never been any question or dispute from the inception of the proceedings, as to the fact that the respondent has been formally sworn in, and is now in full possession of and exercising the functions of the office, but which the relator alleges is by usurpation merely and without any legal right or title to it, under the rule of law before stated we must hold the affidavit of the relator to be insufficient to sustain any of the allegations contained in his petition in reference to the alleged illegal votes cast in the said several election districts mentioned in it. Besides, the weight and credibility of it as evidence in the case is justly subject to the animadversion that it is made in his own interest.

The answer and affidavit of the respondent traverses and denies all the allegations of the relator as to the illegal votes cast and counted for him in the several election districts specified in his petition as fully and directly as it could have been under the general terms in which the allegations are made, without naming any of the persons who are alleged to have so voted.

(The court after noting the five affidavits filed in behalf of the respondent and comparing them with those filed by the relator, continues.)

Now, if upon these affidavits for and against the application we were in our discretion to order this case to go to trial before a jury would it not be very much like going back to the days in the courts of England, spoken of by Lord Mansfield, when as he said such could almost have been done and had for the asking, and if he and the judges of the court of king's bench of that day would not permit the peace and quiet of a municipal corporation

or the office of a mere bailiff of an English borough to be so disturbed without strong and sufficient grounds in the opinion of the court to invalidate his title to it, should this court be less strict or remiss in the observance of the same wise and salutary rule of law and practice, when the validity of an election to the sheriff's office of this great county is the subject of the inquiry moved for in this case? And if the precedent were once set to the contrary on light and frivolous, or insufficient grounds and proof presented on the affidavits, where would it end, particularly in cases of closely contested elections for the office resulting in a small majority or plurality of the popular vote either way, as in the present instance. The desire is very strong and the temptation very great on the part of the defeated party to get rid of such a result, and resort to any means and to strain any evidence in their power to accomplish their purpose of avoiding it.

We have in the affidavits the testimony of five witnesses for the respondent to one for the relator, two of the former officers of the election in question, and all of them resident in the said election district, and extensively acquainted with the voting population of it, against the testimony of a single witness on the other side who is also a resident in said election district, but who mentions no names and gives us no information of how he acquired his singular knowledge that thirty of the persons who voted at the said election for the respondent for sheriff, were not then residents of the said district, as he alleges, the first inquiry naturally presented by it for our consideration, how could that have been done without any one of the five such witnesses learning anything about it. Thirty non-residents is certainly no small number to vote at the polls of a rural election district, and that too without its coming to the knowledge apparently of but one single voter of either party at the polls that day; and it certainly does not lessen the singularity or improbability of it, that no one, not even the witness, Toy himself, made any objections at the polls to the vote of any of them upon that or any other ground, as we are warranted in inferring in the absence of any allegation by him or any other witness to that effect.

The learned counsel for the relator seemed not to be unconscious of the weakness and infirmity of his proof on this point, and sought to palliate and excuse the deficiency of it on the ground that they were obliged to depend on voluntary affidavits solely, and had no power by legal process to compel any person to testify in such a case. But such is the law and the practice in such case, and it proceeds on the ground that it is not reasonable to suppose that any other person in the said election district favorable to the election of the relator, having knowledge of the alleged fact

that he had been defrauded and cheated out of an election to the office in question by thirty, or any smaller number of illegal votes cast for the respondent, he would not have hesitated to depose such knowledge, as soon as called upon for it. And the more strongly are we convinced of it by the loud clamor which was raised over this matter when the board of canvassers met, and by which I regret to say that nearly one half of its members were so much excited and transported by these charges and allegations of fraud and illegality, that they were prepared in their official capacity to perpetrate a more flagrant usurpation upon the powers of the legislature, and the jurisdiction of this court in the premises, in order to prevent the consummation of such an apprehended fraud, than even the alleged usurpation upon the rights of the state which we are now considering in the proceeding before us. For their sole power and duty when assembled as a board of canvass was purely ministerial in the premises. It simply was to ascertain from the certificates of elections returned to it by the inspectors of election in the hundreds and election districts of the county, the state of the election throughout the county, by calculating or adding up the aggregate amount of all the votes which had been given for each office in all the hundreds and election districts in the county, for every person voted for such office, and after the state of the election throughout the county had been thus ascertained by calculating all the votes as before stated, then before any adjournment or separation of the board, to make under their hands their certificates of such election, as provided for and required of them by the statute in that behalf. Rev. Code 124; *The People v. Van Slyck*, 4 Cowp. (K. B.) 297. The statute does not expressly provide or require, although it manifestly imports, we think, that all the members of the board of canvass present should concur and unite in the performance of this purely ministerial function, and in the due and proper discharge of the duty thus imposed upon them, there certainly seems to be no ground whatever for any honest difference of opinion among the members of it who were familiar with the first and most simple rule in arithmetic, and possessed sufficient intelligence on the subject to properly apprehend the obvious legal limit of their official power and authority in the premises. But as the dissenting members of the board were so clearly wrong in declining to join with the majority of it in the certificate of the election of the respondent to the office in question, and in the unlawful course which they adopted on the occasion, it is not entitled to, and of course, cannot have any weight or effect whatever on the decision of the legal question now addressed to the sound discretion of the court in the case, that is to say, whether the respondent was duly elected to the office in question at the general election held in the county on the 7th day of November last,

and whether we have sufficient evidence to the contrary now before us to entitle the relator who also claims it, to an information in the nature of a writ of *quo warranto*, to try that question before a jury at the bar of this court.

And here the first and only question which we consider necessary to determine is this. Is there sufficient evidence before us in the affidavits of the relator and Thomas Toy, the former wholly uncorroborated by the latter in any of its allegations, except as to the illegal votes alleged to have been cast for the respondent in Christiana north election district, and only in part supported by it in relation to that district even, and that to with the material variance and discrepancy existing between them before noticed, and with the latter affidavit, not only wholly uncorroborated by any, but is directly contradicted by all the affidavits filed, on behalf of the respondent, no less than five in number? To this question we must unhesitatingly answer that there is not sufficient evidence to require us in the exercise of a sound discretion with which we are clothed by law on such an application, to grant the leave asked for to file the information, and it is therefore denied.

STATE EX INF. ATTORNEY-GENERAL v. EQUITABLE
LOAN AND INVESTMENT ASSOCIATION OF
SEDALIA.

1897. SUPREME COURT OF MISSOURI. 142 Mo. 325, 41 S. W. 916.

(INFORMATION filed by the Attorney-General to oust respondent from its franchises and corporate privileges. Demurrer attacking the legal capacity of relator to bring suit. Only so much of the opinion as relates to this point is given.)

SHERWOOD, J.—Several points are raised by the demurrer which will now receive consideration; and first as to the capacity of the Attorney-General to institute this proceeding in manner and form as it has been instituted. As to this point it is the settled law of this State that such officer can, of his own motion and without leave of this court, file an information in *quo warranto*, and take all other subsequent and necessary steps to have such cause thus instituted, passed upon and determined. *State ex inf.* Circuit Attorney v. Bernoudy, 36 Mo. 279; *State ex inf.* Attorney-General v. McAdoo, 36 Mo. 452; *State ex rel.* v. Steers, 44 Mo. 223; *State ex rel.* v. Bishop, *ib.* 229; *State ex rel.* v. Hays, *ib.* 230; *State ex rel.* v. Vail, 53 Mo. 97; *State ex rel.* v. Townsley, 56 Mo. 107; *State ex rel.* v. Rose, 84 Mo. 198; *State ex rel.* v. Town of Westport, 116 Mo. *loc. cit.* 605; *State ex rel.* v. McMillian, 108 Mo. 153. See also Short Mand. and *Quo. War.* p. 175; High Ex. Leg. Rem. (2

Ed.) § 45 and cases cited. This has been the rule of this state ever since *State v. Merry*, 3 Mo. 278.

At common law "the old writ of *quo warranto* is a civil writ, at the suit of the crown; it is not a criminal prosecution. * * * This was the true old way of inquiring of usurpations upon the crown, by holding fairs or markets, viz., by writs of *quo warranto*. Then informations in the nature of a *quo warranto* came into use and supplied their place." These observations fell from Mr. Justice Wilmot in *Rex v. Marsden*, 3 Burr. (K. B.) 1817, in the year 1765. See High Ex. Leg. Rem. § 603. In Blackstone, written in 1758, some seven years before the last mentioned period, it is asserted that the proceeding by *quo warranto* "is properly a criminal method of prosecution." Cooley's Black., bk. 3, Ch. 17, p. 262. But whatever the original of the writ, whether civil or criminal, it is certain now at the present time and for a long period anterior to this, it has been and is but a civil suit. There is a distinction, of course, to be taken, a distinction pointed out by Scott, J., in *State v. Ins. Co.*, 8 Mo. 330, between a writ of *quo warranto* and an information in the nature of a *quo warranto*, but while this is true, yet it is also true, even in Blackstone's time, the issuance of the writ itself, owing to its cumbersome length, had long fallen into disuse, which resulted in the modern substitutionary and more speedy method of the filing of *ex officio* informations by the Attorney-General. Cooley Black. bk. 3, Ch. 17, p. 262.

Our Constitution provides in the third section of its sixth article that this court "shall have power to issue writs of *habeas corpus*, *quo warranto*, *certiorari* and other original remedial writs, and to hear and determine the same." Inasmuch as the issuance of a writ of *quo warranto* had not occurred in England for centuries; inasmuch as courts, lawyers and text-writers had been accustomed for hundreds of years to use the expression "writ of *quo warranto*" as the legal equivalent and synonym of "information in the nature of *quo warranto*" it will be presumed that the framers of our Constitution were not unmindful or ignorant of such a common form of expression and the meaning which it bore, and therefore when they used the words "writ of *quo warranto*" they intended thereby only to convey in abbreviated form the meaning that phrase had for so long a period and so continuously been employed to convey, to-wit, "informations in the nature," etc.

Since writing the above it has been found that in other states possessing organic laws like our own, similar conclusions have been reached. *State v. Railroad*, 34 Wis. 197 and cases cited; *State v. Gleason*, 12 Fla. 190 and cases cited; High Ex. Leg. Rem. §§ 610, 611.

And the jurisdiction of the court in this regard being conferred by the Constitution, it is beyond the power of the legislature to

take it away, and it will not be intended that a legislative enactment was designed to take such jurisdiction away, although such enactment should confer another and distinct remedy upon some inferior court or board. *State v. Allen*, 5 Kas. 213; *State v. Massmore*, 14 Wis. 115; *Kane v. People*, 4 Neb. 509; 19 Am. & Eng. Ency. of Law, 664; *People v. Bristol Co.*, 23 Wend. (N. Y.) 222; *People v. Hillsdale Turnp. Co.*, *ib.* 254; *State v. Baker*, 38 Wis. 71; High Ex. Leg. Rem. § 615; 2 Spelling *Ex. Rel.* §§ 1772, 1873. In consequence of this well recognized principle, §§ 7 and 8 of the laws of 1895, pages 31 and 32, in relation to the duties of the supervisor of building and loan associations, to institute proceedings in the circuit court against a delinquent building and loan association, and that such proceeding shall be conducted by the Attorney-General, cannot abate the jurisdiction conferred on this court by the Constitution nor deprive the Attorney-General of his common-law and inherent powers to file *ex officio* informations as in the present instance. And it is well enough to say in concluding this paragraph of the opinion, that the briefs in this cause are not properly entitled, since the Attorney-General in such cases as this is proceeding *ex officio* after the manner of the common law, and entirely independent of and above our statute of *quo warranto* which is derived in substance from 9 Anne c. 20; Tancred *Quo Warranto*, pp. 13 and 14. So that a relator or leave to file information are alike unnecessary to the Attorney-General. And this court has twice determined that in such informations, no relator is required. *State ex inf. Circuit Attorney v. Bernoudy*, 36 Mo. 279; *State ex rel. Brown v. McMillian*, 108 Mo. 153.

COMMONWEALTH EX REL. THE ATTORNEY-GENERAL v.
WALTER.

1876. SUPREME COURT OF PENNSYLVANIA. 83 Pa. St. 105.

MR. JUSTICE PAXSON delivered the opinion of the court.

This was a writ of *quo warranto* issued at the relation of the Attorney-General against the defendant, requiring him to show by what warrant he claims to have, use, exercise and enjoy the office of high sheriff of Butler County. The information charges that the said defendant was a candidate for said office in the year 1875; that he was returned as elected at the general election held in November of that year; that while the said defendant was a candidate for said office, he "was willfully and corruptly guilty of bribery, fraud and the willful violation of the election laws of this Commonwealth." The information then proceeds to charge specific acts of violation of the election laws, and the further offence of

perjury in taking the oath of office. An answer was filed by the defendant, in which the charges set forth in the information are specifically denied. All this took place on a rule to show cause why the writ of *quo warranto* should not go out. The learned judge of the court below was of the opinion that the case was not one in which the writ should issue, and discharged the rule, yet on the request of counsel for the Commonwealth directed the writ to be issued *pro forma*, and immediately quashed it.

It is proper to remark as a matter of practice, that when the Commonwealth through her attorney-general applies for a writ of *quo warranto*, she is entitled to it without a previous rule to show cause. It is not to be presumed that the law officer of the Commonwealth would apply for this high prerogative writ for personal or private ends. He is supposed to be impartial and to seek only the vindication of the rights of the state. It is not so in the case of a private relator, who is usually put to his rule to show cause. It might not be so where the attorney-general merely allows private counsel to use his name, as is sometimes done to procure the writ. But when the attorney-general or his recognized deputy assumes the responsibility the writ should issue in the first instance.

(The Court held that the allegation on the part of the Commonwealth of the existence of certain facts which, if true, amount to a disqualification of respondent, made this a proper subject for inquiry in *quo warranto* and directed the order of the court below quashing the writ to be reversed and set aside and a *procedendo* awarded.)

See generally on the subject of discretion.—Rex v. Parry, 6 A. & E. 810; Gunton v. Ingle, 4 Cranch (C. C.) 438; State v. Centreville Bridge Co., 18 Ala. 678; Commonwealth v. McCarter, 98 Pa. St. 607; Cain v. Brown, 111 Mich. 657; State v. Bruggemann, 53 N. J. L. 122; Stone v. Wetmore, 44 Ga. 495; People v. Boyd, 30 Ill. App. 608; State v. Dowlan, 33 Minn. 536; State v. Stewart, 32 Mo. 379; State v. McNaughton, 56 Vt. 736; Commonwealth v. Jones, 12 Pa. St. 365; State v. Brown, 5 R. I. 1; State v. Lehre, 7 Rich. L. (S. Car.) 234; People v. Keeling, 4 Colo. 129; People v. Sweeting, 2 Johns. (N. Y.) 184.

No discretion where the attorney-general files the information *ex officio*; Rex v. Trelawney, 3 Burr. 1615; People v. Hartwell, 12 Mich. 508, 522; State v. Pennsylvania &c., Co., 23. Oh. St. 121; State v. Brown, 5 R. I. 1; State v. Elliott, 13 Utah 200; State v. Town of Westport, 116 Mo. 582; Commonwealth v. Allen, 128 Mass. 308.

English statutory provisions adopted in the American common law.

The following statutes relating to *quo warranto* were in force at the time of the reception of the English common law in America and unless changed by specific statutory enactment are considered as still in force in so far as they are applicable to our form of government and institutions.

STATUTE OF GLOUCESTER.

6 Edward I., Ch. 2, A. D. 1278.

A statute of *quo warranto*, made at Gloucester, Anno 6 Edward I,

I. The year of our Lord MCCLXXXVIII, the sixth year of the reign of King Edward, at Gloucester, in the month of August, the king himself providing for the wealth of his realm, and the more full administration of justice, as to the office of a king belongeth (the more discreet men of the realm, as well of high as of low degree, being called thither,) it is provided and ordained, that whereas the realm of England, in divers cases, as well upon liberties as otherwise, wherein the law failed, to avoid the grievous damages and innumerable dishersions that the default of the law did bring in, had need of divers helps of new laws, and certain new provisions, these provisions, statutes and ordinances underwritten shall from henceforth be straitly and inviolably observed of all the inhabitants of this realm. And whereas prelates, earls, barons and others of our realm that claim to have divers liberties, which to examine and judge, the king hath prefixed a day to such prelates, earls, barons and others, it is provided and likewise agreed that the said prelates, earls, barons and others shall use such manner of liberties after the form of the writ here following:

(II. *Rex vic' salutem. Cum nuper in parlamento nostro apud westmonasterium, per nos & concilium nostrum provisum sit & proclamatum, quod prelati, comites, barones, & alii de regno nostro, qui diversas libertates per chartas progenitorum nostrorum regum anglie habere clamant, ad quas examinandas & judicandas diem praefixerimus in eodem parlamento, libertatibus illis taliter uterentur, quod nihil sibi per usurpationem seu occupationem accrescerent, nec aliquid super nos occuparent. Tibi precipimus, quod omnes illos de comitatu tuo libertatibus suis, quibus hujusque rationabiliter uti sunt, uti & gaudere permittas in forma prae-dicta, usque ad proximum adventum nostrum per comitatum praedictum, vel usque ad proximum adventum justiciariorum itinerantium ad omnia placita in comitatu, vel donec aliud inde praeceperimus: salvo semper jure nostro cum inde loqui voluerimus. Teste, etc.*)

III. In like manner, and in the same form, writs shall be directed to sheriffs and other bailiffs for every demandant, and the form shall be changed after the diversity of the liberty which any man claimeth to have, in this wise:

(IV. *Rex vic' salutem. Praecipimus tibi, quod per totam ballivam tuam videlicet, tam in civitatibus, quam in burgis & aliis villis mercatoribus, & alibi, publice proclamari facias, quod omnes illi qui aliquas libertates per chartas progenitorum nostrorum regum anglie vel alio modo, habere clamant, sint coram justiciariis nostris ad primam assisam, cum in partes illas venerint, ad ostendendum quomodo hujusmodi libertates habere clamant, & quo warranto, & tu ipse sis ibidem personaliter una cum ballivis & ministris ad certificandum ipsas justiciarios super his & aliis negotiis illud tangentibus.*)

V. This clause of liberties, that beginneth in this wise, *Praecipimus tibi, quod publice proclamari facias, etc.*, is put in the writ of common summons of the justices in eyre, and shall have a premonition by the space of forty days, as the common summons hath; so that if any party that claimeth to have a liberty be before the king, he shall not be in default before any justices in their circuits; for the king of his special grace hath granted that he will save that party harmless as concerning that ordinance. And if the same party be impleaded upon such manner of liberties before one or more of the foresaid justices, the same justices before whom the party is impleaded shall save him harmless before the other justices, and so shall the king also before him, when it shall appear by the justices that so it

was in plea before them as is aforesaid. And if the aforesaid party be afore the king, so that he cannot be the same day afore the justices in their circuits, the king shall save that party harmless before the foresaid justices in their circuits for the day whereas he was before the king. And if he do not come in at the same day, then those liberties shall be taken into the king's hands in name of distress, by the sheriff of the place, so that they shall not use them until they come to answer before the justices; and when they do come in by distress, their liberties shall be replevied (if they demand them), in the which replevins they shall answer immediately after the form of the writ aforesaid; and if percase they will challenge, and say they are not bounden to answer thereunto without an original writ, then if it may appear by any mean that they have usurped or occupied any liberties upon the king, or his predecessors, of their own head or presumption, they shall be commanded to answer incontinent without writ, and moreover they shall have such judgment as the court of our lord the king will award; and if they will say further that their ancestors died seized thereof, they shall be heard, and the truth shall be inquired incontinent, and according to that judgment shall be given; and if it appear that their ancestors died seized thereof, then the king shall award an original out of the chancery in this form: (*Rex vic' salutem. Sum' per bonos summon' talem, quod sit coram nobis apud talem locum in proximo adventu nostro in com' praedict' vel coram justiciariis nostris ad proximan assisam, cum in partes illas venerint, ostensurus quo warranto tenet visum francpleg' in manerio suo de N. vel sic, quo warranto tenet hundredum de S. in com' praedict'; vel quo warranto clamat habere thelonium pro se & hacedibus suis per totum regnum nostrum; & habeas ibi hoc breve. Teste, etc.*) And if they come in at the same day, they shall answer, and replication and rejoinder shall be made; and if they do not come, nor be essoined before the king, and the king do tarry longer in the same shire, the sheriff shall be commanded to cause them to appear the fourth day; at which day, if they come not, and the king be in the same shire, such order shall be taken as in the circuit of justices; and if the king depart from the same shire, they shall be adjourned unto short days, and shall have reasonable delays according to the discretion of the justices, as it is used in personal actions. Also the justices in eyre in their circuits shall do according to the foresaid ordinance, and according as such manner of pleas ought to be ordered in the circuit. Concerning complaints made and to be made of the king's bailiffs, and of others, it shall be done according to the ordinance made before thereupon, and according to the inquests taken thereupon heretofore; and the clause subscribed shall be put in a writ of common summons in the circuit of the justices assigned to common pleas directed to the sheriff, etc., and that shall be such: (*Rex vic' salutem. Praecipimus tibi, quod publice proclamari facias, quod omnes conquerentes, seu conqueri volentes, tam de ministris & aliis ballivis nostris quibuscunque, quam de ministris & ballivis aliorum quorumcunque, & aliis, veniant coram justiciariis nostris ad primam assisam, ad quascunque querimonias suas ibidem ostendendas, & competentes emedas inde recipiendas secundum legem & consuetudinem regni nostri, & juxta ordinationem per nos inde factam, & juxta tenorem statutorum nostrorum, & juxta articulos iisdem justiciariis nostris inde traditos, prout praedicti justiciarii tibi scire faciant ex parte nostra. Teste meipso, etc., decimo die decembris, anno regni nostris, etc.*)

STATUTE DE QUO WARRANTO NOVUM.

18 Edward I. St. 2, A. D. 1290.

I. Forasmuch as writs of *quo warranto*, and also judgments given upon pleas of the same, were greatly delayed, because the justices in giving judgment, were not certified of the king's pleasure therein; our lord, the king, at his parliament holden at Westminster, after the feast of Easter, the eighteenth year of his reign, of his special grace, and for the affection that he beareth unto his prelates, earls and barons, and others of his realm, hath granted, that all under his allegiance, whatsoever they be, as well spiritual as other, which can verify by good enquest of the country, or otherwise, that they and their ancestors or predecessors have used any manner of liberties, whereof they were impleaded by the said writs, before the time of King Richard, our cousin, or in all his time, and have continued hitherto (so that they have not misused such liberties), that the parties shall be adjourned farther unto a certain day reasonable before the same justices, within the which they may go to our lord, the king, with the record of the justices, signed with their seal, and also return; and our lord, the king, by his letters patents, shall confirm their estate. And they that cannot prove the s isin of their ancestors or predecessors in such manner as is before declared, shall be ordered and judged after the law and custom of the realm; and such as have the king's charter shall be judged according to their charters.

II. Moreover, the king of his special grace hath granted, that all judgments that are to be given in pleas of *quo warranto*, by his justices at Westminster, after the foresaid Easter, for our lord the king, himself, if the parties grieved will come again before the king, he of his grace shall give them such remedy as before is mentioned. Also, our said lord the king, hath granted, for sparing of the costs and expenses of the people of his realm, that pleas of *quo warranto* from henceforth shall be pleaded and determined in the circuit of the justices, and that all pleas now depending shall be adjourned into their own shires, until the coming of the justices into those parts.

STATUTE OF ANNE.

9 Anne, ch. 20, A. D. 1710.

IV. And be it further enacted by the authority aforesaid, that from and after the first day of Trinity term, in case any person or persons shall usurp, intrude into, or unlawfully hold and execute any of the said offices or franchises, it shall and may be lawful to, and for the proper officer in each of the said respective courts, with the leave of the said courts respectively, to exhibit one or more information or informations in the nature of a *quo warranto*, at the relation of any person or persons desiring to sue or prosecute the same, and who shall be mentioned in such information or informations to be the relator or relators against such person or persons so usurping, intruding into, or unlawfully holding and executing any of the said offices or franchises, and to proceed therein in such manner as is usual in cases of information in the nature of *quo warranto*; and if it shall appear to the said respective courts, that the several rights of divers persons to the said offices or franchises may properly be determined on one information, it shall and may be lawful for the said respective courts to give leave to exhibit one such information against several persons, in order to try their respective rights to such offices or franchises, and such person or persons against whom such information or informations in the nature of *quo warranto* shall be sued or prose-

cuted, shall appear and plead as of the same term or sessions in which the said information or informations shall be filed, unless the court where such information shall be filed shall give further time to such person or persons against whom such information or informations shall be exhibited to plead; and such person or persons who shall sue or prosecute such information or informations in the nature of *quo warranto* shall proceed thereupon with the most convenient speed that may be; any law or usage to the contrary thereof in anywise notwithstanding.

V. And be it further enacted and declared by the authority aforesaid, that from and after the first day of Trinity term, in case any person or persons against whom any information or informations in the nature of *quo warranto* shall in any of the said cases be exhibited in any of the said courts, shall be found or adjudged guilty of an usurpation, or intrusion into, or unlawfully holding or executing any of the said offices or franchises, it shall and may be lawful to and for the said courts respectively as well to give judgment of ouster against such person or persons, of and from any of the said offices or franchises, as to fine such person or persons respectively, for his or their usurping, intruding into, or unlawfully holding and executing any of the said offices or franchises; and also it shall and may be lawful to and for the said courts respectively to give judgment that the relator or relators, in such information named, shall recover his or their costs of such prosecution; and if judgment shall be given for defendant or defendants in such information he or they for whom such judgment shall be given shall recover his or their costs therein expended against such relator or relators; such costs to be levied in manner aforesaid.

VI. And be it further enacted and declared by the authority aforesaid, that it shall and may be lawful to and for the said courts respectively to allow such person or persons respectively, to whom any writ of mandamus shall be directed, or against whom any information in the nature of *quo warranto*, in any of the cases aforesaid, shall be sued or prosecuted, or to the person or persons who shall sue or prosecute the same, such convenient time respectively, to make a return, plead, reply, rejoin or demur, as to the said courts respectively shall seem just and reasonable; anything herein contained to the contrary thereof in anywise notwithstanding.

VII. And be it further enacted by the authority aforesaid, that after the said first day of Trinity term, an act made in the fourth year of her majesty's reign, entitled "An act for the amendment of the law, and the better advancement of justice" and all the statutes of jeofayles, shall be extended to all writs of mandamus and informations in the nature of *quo warranto*, and proceedings thereon, for any the matters in this act mentioned.

Section 2.—Against Municipal Corporations and Public Officers.

1. Origin and early uses of the writ as against municipalities.

"On the Restoration, Charles II, found the principal opposition to the court to come from the cities and boroughs. He commenced his reign by reconstructing the (municipal) corporations and filling them with his own creatures. Judges, also creatures of the king, holding commissions during his pleasure, aided him in his scheme to acquire absolute control over the corporations of the realm. London, as the largest and most influential, was selected as an example, and in 1683, the famous *quo warranto* was issued against the city to deprive it of its charter, for two alleged violations, one of which was stale and both were frivolous. Judgment passed, of course against the city, and its ancient charter was abrogated. As a condition of its restoration, it was, among other things, provided that thereafter the mayor, sheriff, clerk, etc., should not exercise their office without the king's consent; and that if the king twice disapproved of the officers elected by the corporation, he might himself appoint others. In short, the city was deprived of the right of choosing its own officers, and was made dependent upon the crown. Such also was the fate of most of the considerable (municipal) corporations of England. The whole power was in the hands of the king."

"Nor were these arbitrary proceedings confined to England. In 1683, writs of *quo warranto* and *scire facias* were issued for the purpose of abrogating the charter of Massachusetts. Patriotism and religion mingled their fervors and combined in its defence, but in vain. Servile judges in June 1684, one year and six days after the judgment against the city of London, adjudged the charter to be conditionally forfeited. The charter government was displaced, and popular representation superseded by an arbitrary commission. In 1687 similar writs were issued against the charters of Rhode Island and Connecticut; when, as is well known, the people of the latter colony unsuccessfully endeavored to preserve this cherished muniment of their liberties by concealing it in the "charter-oak." The colonies as a result of the English revolution of 1688, had their charters restored. Very shortly after the accession of William and Mary a bill to restore the rights of those English corporations which had surrendered their charters to the crown during the reigns of James II and Charles II, was introduced into parliament, and became a law with the general applause of men of all parties." 1 Dillon Mun. Corp., § 8 ff.

(During the reigns of James II and Charles II no less than eighty-one *quo warranto* informations were brought against municipal corporations in England.)

"In no instance known to the author have the courts of this country declared *forfeited the charter or franchises* of a municipal corporation for the acts or misconduct of its agents or officers. That this was done by the English courts prior to the revolution of 1688 is well known. The case of the city of London is the most conspicuous historical example. It is believed by the author that such a remedy is not applicable to our corporations, created, as they are, by statute, for the benefit, not of the officers or a few persons, but of the whole body of the inhabitants residing therein, and the public. If the officers usurp rights which belong to the state, the law, by *quo warranto*, by injunction, by action, by declaring their acts void, and in other ways, can correct the usurpation, and should do it without forfeiting the rights and franchises of the citizens, who are blameless." 2 Dillon Mun. Corp., § 896.

COMMONWEALTH v. CITY OF PITTSBURGH.

1850. SUPREME COURT OF PENNSYLVANIA. 14 Pa. St. 177.

THE opinion of the court was delivered by

COULTER, J.—The attorney general is required by the 3d section of the act in relation to writs of *quo warranto*, passed 16th of June, 1836, whenever he shall believe that any corporation has *forfeited its corporate rights, privileges or franchises*, to file a suggestion and to proceed to the determination of the matter, and in pursuance of his power he has filed this suggestion against the corporation of the Mayor, Aldermen and citizens of Pittsburgh; and alleges that by the ordinances of the council which repealed a certain prior ordinance passed in 1831, vesting in the mayor the appointment of the night watch and patrol; also by vesting the appointment of said watch in a committee of councils, and finally by the appointment of the night watch by the councils themselves; the said corporation has claimed to use, and has used unlawfully, liberties and franchises not belonging to it; and all of which privileges the said corporation has usurped against the commonwealth, etc; and a rule was granted at his instance, against the corporation, to show cause why a writ of *quo warranto* should not issue against the said corporation, commanding them to appear and show by what cause and authority they exercised such privileges and franchises. The corporation appeared at the return of the rule, and was heard by her attorneys, and the commonwealth was heard by the representative of the attorney general.

The corporation, even admitting all the allegations in the suggestion, has not usurped from the commonwealth any liberty, fran-

chise or privilege; nor has she by anything or act, shown to this court, invaded the rights or privileges of any other corporation, nor the rights or privileges of any other corporation, nor the rights or privileges of the people at large. She has used no right or franchise that did not belong to the corporation. It has done nothing more than use privileges and franchises, unquestionably belonging to the corporation, and incident to the emergencies and requirements of its beneficial existence, to-wit:—the appointment of a night watch. That the corporation possessed this power will hardly be questioned by any reasonable man. That two of the functionaries, the legislative department, the councils, and the executive department, the mayor, have disputed about their respective powers in the matter, is admitted. *But the charter was not granted for the benefit of the mayor or the councils either, but for the benefit of the people of the great municipality.* The law has abundant means and power of settling this dispute between the functionaries, without detriment to the people or corporation. Then why should the people be punished for the wrangling of the officers.

The charter is the charter of the people, and shall they be punished by wresting it from them, and throwing their whole concerns into confusion and disorder, because the mayor and the council dispute? The municipality of the city government has been built up and perfected through a course of many years, and by many acts of assembly; and by many by-laws and ordinances, as were suggested by experience and time. And shall all this fair fabric, on which lie so many duties and obligations, on which most of the welfare and security of the citizens of a great community depend, be torn down, and be destroyed by the turbulence of any officer or officers? A case has been cited from the reign of the Stuarts in England, as authority and precedent, in the instance of the forfeiture of the charter of London, for irregularity in passing some ordinance. But it must be recollected that the object and policy of the royal government at that time, was to circumvent the liberties of the people, and one means of doing that was to forfeit the franchises of corporations, through the instrumentality of pliant judges, who then held the office at his will, to the use of the king, who granted them out to his creatures upon principles less favorable to liberty. But after the revolution of 1768, when that race was driven from the throne, the parliament reversed this decision or judgment, and enacted that thereafter, the franchises of the city should not be forfeited for any cause by the courts. And why should the franchise of any municipal government be forfeited on account of the misconduct, alleged or real, of its officers? The usurpation of officers can be corrected by suitable means, leaving untouched the rights, franchises, and liberties of the citizens and corporators.

If the mayor, who we must believe from the force of the sug-

gestion, is the real complainant, had filed a suggestion against the council for usurping his functions, this court could, under the eighth section of the act relating to writs of *quo warranto*, have made him, although the relator, a party respondent also, and then determined on his rights and authority as well as on those of the councils; and could have pronounced judgment of ouster against whoever was in the wrong; and in such case, by the 15th section of the act of April 13, 1850, being a supplement to the act relating to Orphan's courts, this court could have appointed trustees from among the citizens eligible to office in the corporation, as trustees to take charge of the corporation until new officers were chosen according to the provisions of the charter.

But in this proceeding we could pronounce no judgment except forfeiture of franchises and of the charter, against the corporation, which would dissolve it and return it to its original elements. We cannot think of such a result; there is not the slightest cause for it. The proceeding has worn a grotesque appearance, in my judgment, from the beginning. The rule is therefore discharged.

Rule discharged.

STATE v. VILLAGE OF BRADFORD ET AL.

1859. SUPREME COURT OF VERMONT. 32 Vt. 50.

REDFIELD, CH. J.—This is a motion and summons against the defendants, wherein the state's attorney, as the representative of the sovereignty of the state, asks leave to file an information against the nominal and *de facto* corporation of the village of Bradford for having usurped the prerogatives and franchises of a municipal corporation within the state, without the grant or the permission of the state; and against the other defendants for having unlawfully and without proper warrant, presumed to hold and exercise the offices of such usurping corporation.

The corporation make no answer or defence in form, except to put the prosecutor on proof of the allegations contained in the information. We are satisfied from the evidence in the case, that there could not have been a legal majority of the voters present at the meeting in favor of accepting the charter, and that it did not thereby become a binding law. The organization therefore under it is a mere usurpation of corporate franchises, without any legal warrant.

In such cases, the law is well settled, in England, that upon the information of the attorney general the court of King's Bench will abate and dissolve the corporation, whether it be a private or a public one. When a corporation is of a public character, like

a town or a village, which constitute integral portions of the sovereignty itself, there is more propriety in visiting the usurpation of these important functions of sovereignty, with this formal denial of their right to exercise such usurpation, than in the case of a mere private corporation, but the law seems to be the same in either case.

It is only the sovereign power of the state which can create corporate franchises, and all who presume to exercise them without the consent of such authority are liable to this mode of procedure.

We think there can be no question that the corporation *de facto* should be dissolved.

And in regard to the other defendants it seems that they now disclaim any purpose of exercising the functions of the offices to which they were elected, and of which election a formal record was made, and which has been certified in this case by one of the defendants, as secretary of the usurping corporation. All that is requisite in regard to them will be effected by a judgment against the corporation, perhaps, but we see no reason why a judgment of ouster should not be formally entered against them. If the title to a corporate office is only defective from an irregular swearing in, the judgment against the party is only for a fine for the temporary usurpation, and that he do not exercise the office until sworn in. *Rex v. Clarke*, 2 East (K. B.) 75; 9 East (K. B.) 246 *et seq.* Judgment of seizure of the franchises to the use of the king may be given against a corporation upon a disclaimer and this will preclude the party from afterwards setting up the same title. *S. C. and Rex v. Mayor*, 3 B. & A. (K. B.) 590; *Rex v. Chester*, 2 Show. (K. B.) 365; on a *nil dicit* to a *quo warranto* information, the judgment is *quod capiatur*; *Rex v. Tyrrill*, 11 Mod. Rep. (K. B.) 235. Where the franchises are usurped the judgment is *quod extinguantur*. *Smith's case*, 4 Mod. Rep. (K. B.) 54, 56. Judgment was given in *quo warranto* against the city of London, that the liberties thereof being seized into the king's hands, did not dissolve the corporation or remove the officers from their corporate offices. But where the corporation is intended to be dissolved, judgment to that effect should be formally entered. *Sir James Smith's case*, 4 Mod. Rep. (K. B.) 52; 14 Petersdorff 111 Note.

Judgment that the state's attorney be allowed to file his information; and therefore the court do adjudge that the facts therein set forth are true, and that the said pretended corporation of the village of Bradford be, and the same hereby is, dissolved, and that the other defendants no longer exercise any of the functions pertaining to said offices, but that no costs be taxed against any of the defendants.

Quo warranto is the proper remedy to determine the question of the legal existence of a municipality.—*Territory v. Armstrong*, 6 Dak. 226; *Whalin v. City of Macomb*, 76 Ill. 49; *Mullikin v. City of Bloomington*, 72

Ind. 161; Brennan v. City of Weatherford, 53 Tex. 330; People v. Gartland, 75 Mich. 143. But see State v. Board of Education, 7 Oh. Cir. Ct. 152; Kayser v. Trustees, etc., 16 Mo. 88; People v. Grand Co. Com'rs, 6 Colo. 202.

2. Acquiescence or continued recognition may bar the writ.

STATE V. LEATHERMAN ET AL.

1881. SUPREME COURT OF ARKANSAS. 38 Ark. 81.

EAKIN, J.—This case invokes the original jurisdiction of this court, in one of the cases provided for, by the fifth section of Article VII of the Constitution. It is an application by the attorney general in the nature of an information on behalf of the state against the mayor, aldermen and recorder of the town of "Arkansas City" to test the legal existence of the city as a corporation; substantially it is an application for a writ of *quo warranto*. Notwithstanding some earlier decisions to the contrary, it had long before the adoption of the constitution of 1874, been the practice of this court to disregard the distinction between the old writ of *quo warranto* and the information in the nature of it; and the constitution in giving this court the power to issue the writ of *quo warranto* to test the legal existence of municipal corporations, may be held, in view of the settled practice, to mean and include informations for public purposes in the nature of the writ, as well as the old writ itself.

The language of our constitution relieves us of the necessity of deciding a point of practice which has been elsewhere a matter of some embarrassment; that is, whether the suit should be against the corporation itself, *eo nomine*, or may be against its officers. It is that this court may issue the writ to officers of political corporations, "when the question involved is the legal existence of such corporations," thus not only giving the jurisdiction, but prescribing its limits, and the proper parties.

The cause is submitted on demurrer to the answer. The only question presented by the pleadings is, whether the town of "Arkansas City" can be recognized as an existing corporation. The material facts disclosed by the admissions to the answer are: that an attempt was made to organize the town as a corporation, upon application to the circuit court of Chicot county, and by virtue of an order thereof, made on the 12th day of September, 1873. It is conceded save as to the tribunal, that the organization was effected, substantially, in accordance with the general incorporation act then in force. It further appears that from that time until the commencement of this suit the town had continuously exercised the powers and

franchises of a corporation, electing officers of whom the mayors successively elected had been commissioned by the governor, and the others had been duly qualified; passing and enforcing ordinances, collecting fines, making public improvements, entering into contracts for the public benefit; levying taxes, which from time to time, had been regularly extended on the tax books, and placed in the hands of the county collector, and that for delinquencies for the payment of such taxes, lands had been sold and titles had become involved.

Other matters of like nature tending to show the inconvenience and embarrassment of now holding the corporation void *ab initio* are now urged; and it is also shown that the territory of the town is upon the Mississippi River and the common terminus of two railroads from the interior; that it has a population of from one to two thousand inhabitants, that many strangers are continually passing and that it requires a local police for the protection of the property, and the security of the peace. Further that the ground had been platted into blocks, lots, alleys, streets, parks, etc., which plat had been recorded and sales and transfers had been made with reference thereto.

It will be seen that two points only are presented; 1st. Was the corporation organized in accordance with law so as to acquire thereby a valid existence; and, 2d, if not, has the acquiescence of the state for so long a period so affected her right to now question the franchise as to leave it within the power of this court in the exercise of a sound discretion to refuse a relief fraught with consequences so disastrous to the long line of officers, and list of contractors and purchasers of property, who have been acting *bona fide* and in obedience to and in accordance with what they supposed to be a legitimate governing body? It goes without saying, that if this court can find this discretion, it will, under the circumstances disclosed, exercise it to cure what has been done, and maintain the existing order of things. Whilst a moral wrong can never rest harmless, a mere mistake may become so inserted in healthful surroundings, and imbedded under supervening rights, as to make its extraction as dangerous as useless.

Upon the first point it is obvious that the circuit court and the petitioners in the proceedings for organization, mistook the tribunal. The power had been conferred upon the circuit court by the general incorporation act of 1868; but this act has been superseded by another covering the same ground, passed April 9th, 1869. The latter act has not been published in the regular pamphlet acts of the session, but in a separate one commonly known to the profession in our state as McClure's digest, which contained a collection of acts supposed to have been adopted by the legislature, as a part of the general revision of the whole statutory law of the state. The

greater part of them, however, though not all, were held invalid by the courts (*Vinsant v. Knox*, 27 Ark. 266). Amongst those sustained was the said act of 1869, vesting in the county courts the jurisdiction to determine and pronounce upon the creation of municipal corporations. At that time, by the constitution then in force, the powers which the legislature might vest in county courts were not strictly limited, and the right to confer upon them this power cannot be seriously questioned.

On the third of April, 1873, county courts were abolished, and boards of county supervisors appointed in their stead, to which were transferred all the powers and duties of the county courts. It is noticeable, however, that the legislature afterwards, on the 28th of April 1873, seems to have overlooked the former transfer of jurisdiction from the circuit courts, or at least to have still considered it a very appropriate tribunal for kindred subjects. By act of that date, making provision for annexation of territory to corporations, it was provided that application for the purpose should be made to the circuit courts. It is rather suggested to the courts, then contended, that this was a recognition of a remaining jurisdiction there, over the subject matter; which would still authorize those courts to receive and act upon applications for the creation of new corporations. We cannot so extend the language of the act, which regards annexations only. It seems anomalous, and was, perhaps, passed under the mistaken impression that the act of 1868 was still in force but we cannot on that account, hold the act of April 9th as having been suspended.

So the law stood when the order of the circuit court was made, establishing Arkansas City. There was no jurisdiction and the order was void. I find nothing to cure this in the constitution of 1874 nor in subsequent legislation. The new general incorporation act of March 9, 1875, § 5, adopted only such corporations as were existing at the time the new constitution took effect and which had been described or denominated by some law then in force. This had not been.

But it had been an existing *de facto* corporation all the time from 1873 till now: and many things had in good faith been done under it which would be shocking now to undo. The disastrous consequences would not be confined to the case of Arkansas City. Municipal corporations throughout the state have become numerous. They are not only highly beneficial, but necessary agencies of good government. We can see how many of them may heretofore have been, or may be henceforth, put in operation under the same, or similar mistake. To declare them all null, after long acquiescence on the part of the state would open a very Pandora's box of litigation, and produce incalculable hardship and confusion.

This compels us to the broader field of inquiry, whether this court,

in view of justice, equity, and the security of titles, can find in recognized principles of law, sufficient warrant for refusing its aid in opening the flood gates of such unmitigable evil.

The practice of filing informations in the nature of *quo warranto* existed at common law. But it was always on the relation of the attorney general, to vindicate or protect the rights of the crown against usurpation and abuse of its franchises. Never upon the relation of a private person to try his right to an office, until the statute of Anne, which made this proceeding subservient to the trial of private rights of this nature, and allowed informations by the attorney-general on the relation of individual citizens for their benefit. *The statute was never in force in this state.* We have other appropriate proceedings to try and determine between the individuals, the right to hold office. The course of judicial decisions under the act in England, are, however, worthy of note, being pregnant examples of their tendency to prevent the abuse of the proceedings, after long acquiescence on the part of those assuming to have been aggrieved.

Originally, upon the passage of the act, the granting of these informations was a matter of course; and when once filed, by leave, the courts felt bound to determine the right by strict law regardless of consequences. *This afterwards ceased to be the practice in the case of private relators. The granting of leave was made to depend on the sound discretion of the court, which it came to exercise upon the particular circumstances of each case.* Although at common law, the time in which the right to exercise an office might be impeached, was indefinite, the person against whom the remedy, under the act of Anne, was sought, might show that his right had been acquiesced in for a long time. By analogy to the statute of limitations the time was at first fixed at twenty years. Afterwards it was reduced to six. See cases collected and cited in Bacon Abr. (Informations, D). See also High Ex. Rem. (*Quo Warranto*). (*passim*). I do not find however, that any English cases go to the extent of holding that this applies to other cases than those of private relators seeking personal rights; or that the doctrine of "*nullum tempus occurrit regi*" has ever been there ignored in case of such applications, in behalf of the sovereign, as the attorney general might have made before the act of Anne. The discretion of the court, indeed, although not used at first, is based upon the language of the act, which expressly provides that the relations therein allowed must be filed by leave of the court.

But times change, and the exigencies of society and good government change with them. The great multitude of new municipal corporations continually springing up in the American States, their convenience, and indeed absolute necessity, as agencies of the government and the danger of the impending evils to which I have,

alluded, have induced several American Courts and distinguished jurists to go a step further, and apply this discretion to proceedings on the part of the state herself, without any private relator. The step seems to have been impelled *ex necessitate rei*, and in truth implies sounder views, and advanced ideas of the nature of sovereignty, as resting in the state, for the public good, and not for the distraction of business and confusion of rights.

The case of *Jameson v. People*, 16 Ill. p. 257, was a *quo warranto* to test the validity of a municipal corporation, which had not been organized in accordance with law. The corporation had gone into operation and had been named in a subsequent legislative act, giving it certain powers. This was held to have cured the irregularity but the opinion of the court goes upon still broader grounds. Skinner, J., said "If there is no such corporation, all acts done under the supposed corporate powers, are mere nullities, and no liability can exist by reason of contracts made in the corporate name. Were we to hold, after this acquiescence of the public, and these recognitions of the legislature that the town remains unincorporated, on account of some defect in its original organization as a corporation, what confidence could individuals have in the validity of securities emanating from these local authorities? Municipal corporations are created for the public good—are demanded by the wants of community; and the law, after long continued use of corporate powers, and the public acquiescence, will indulge in presumptions in favor of their legal existence." It is true that the defect of organization in that case was only the result of an irregularity, and there had been an express legislative recognition. But the grounds upon which the court proceeds extend much beyond the facts of the particular case.

The case of *the People v. Maynard*, 15 Mich. 470, was an information in the name of the attorney general, by a private relator, against the treasurer of a county. The case, as to facts, is not in point, as an authority; but in the course of the opinion, I find these broad grounds again asserted: "In public affairs, where the people have organized themselves, under color of law, into the ordinary municipal bodies, and have gone on, year after year, raising taxes, making improvements, and exercising their usual franchises, their rights are properly regarded as depending quite as much on the acquiescence, as on the regularity of their origin, and no *ex post facto* inquiry can be permitted to undo their corporate existence. Whatever may be the rights of individuals before such general acquiescence, the corporate standing of the community can be no longer open to question."

There is a case in the early reports of Alabama, *State v. Burnett*, 2 Ala. N. S. P. 140, in which the judge in arguing, recognizes the discretion of the court to refuse an information at the instance

of one who had no claim to the office, and also when the franchise involved no question of private rights "as in the case of corporations, either public or private." The distinction drawn in that case, however, seems to us novel, inasmuch as it denies the discretion where the information is in behalf of a private right.

The opinions above quoted taken altogether, although none are exactly in point, seem to us utterances of an enlightened and progressive jurisprudence, widening and adapting itself to free American institutions, and the rapid development of the country in the growth of towns and cities.

We are emboldened by them to declare in behalf of the public good, that *the state herself may, by long acquiescence, and by the continued recognition through her own officers—state and county—of a municipal corporation, be precluded from an information to deprive it of franchises long exercised in accordance with the general law.*

The case made by the answer shows an acquiescence for nearly nine years, and a recognition by the governor, county court, county clerk, county collector, and the whole of the population now over a thousand. If the answer be true, the corporation of Arkansas City should not *now* be held null and void.

Overrule the demurrer.

See also, *State v. Town of Westport*, 116 Mo. 582; *State v. Gordon*, 87 Ind. 171; *People v. Maynard*, 15 Mich. 463. Also *People v. Farnham*, 35 Ill. 562; *Jameson v. People*, 16 Ill. 256.

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3. Will not lie as a remedy for a neglect to perform a corporate duty or to annul a municipal ordinance.

ATTORNEY GENERAL v. CITY OF SALEM.

1869. SUPREME JUDICIAL COURT OF MASSACHUSETTS.
103 Mass. 138.

MORTON, J.—

This is an information in the nature of a *quo warranto*. The defendants have demurred; and the only question before the court is, whether upon the facts stated in the information it can be sustained.

Under the statute of 1864, c. 268, "for supplying the city of Salem with pure water", the said city has constructed works for supplying the inhabitants with water at an expense of a million dollars or more, and has issued scrip or bonds to that amount. The thirteenth section of said act provides that "the city council shall

establish such price or rents to be paid for the use of the water, as to provide annually, if practicable, from the net income and receipts therefor, for the payment of the interest, and not less than one per cent. of the principal of the "city of Salem water loan" and shall determine the manner of collecting the same. The net surplus income and receipts, after deducting all expenses and charges of distribution, shall be set apart as a sinking fund, and applied solely to the principal and interest of said loan until the same is fully paid and discharged."

The information alleges in substance that the city, disregarding these provisions of law, has established merely nominal rates, and rents to be paid for water, with the fraudulent intent and purpose to distribute water free to all its inhabitants and to all its business men and corporations, and to tax the property and polls of the inhabitants to pay said interest upon the water loan and the expenses of operating the said works and the said one per cent. upon the principal of the said loan. The prayer of the information is, that the city may be made to answer to the commonwealth by what warrant it claims to do the acts and to exercise the rights and powers aforesaid; and that said city and its officers may be enjoined from supplying water at nominal prices, and from making contracts at that rate, and to that effect, and from taxing its inhabitants to pay said interest and the expenses of operating the works and the one per cent. towards the capital of the water loan.

An information in the nature of *quo warranto* has, in modern practice, taken the place of the ancient writ of *quo warranto*, which was in the nature of a writ of right for the king against whoever claims or usurps any office, franchise or liberty, to inquire by what authority he supports his claim, in order to determine the right. 3 Blackstone Comm., 262; 6 Dane Abr. 360; Cole Informations, 110. Such information lies when the party proceeded against has usurped some office, franchise or liberty, to which he has no right; or when having an office or a franchise, he has by nonuser or abuse forfeited it, and the information is brought for the purpose of enforcing such forfeiture. *People v. Turnpike Company*, 23 Wend. (N. Y.) 222. *But it is not the appropriate remedy when the object is to enforce the performance of duties imposed by law.*

The judgments upon an information in the nature of a *quo warranto* are adapted to the purposes above stated. The judgment may be, that the franchise usurped or abused be seized and forfeited to the commonwealth, if the commonwealth can enjoy it; if not, the judgment is ouster and fine. Such judgment, in either form is clearly inapplicable, where the purpose of the proceeding is to compel the performance of a duty, which the defendant neglects or refuses to perform, or to restrain the improper use of a franchise or

power, clearly granted, which does not work a forfeiture of the whole franchise.

In the case at bar, upon a careful analysis of the allegations in the information, it is plain that the grievance complained of is not that the defendants have usurped a franchise not granted but that they neglect to perform a duty imposed upon them by law in the exercise of a legal franchise. Their alleged default is, that they do not establish such rates or prices to be paid for the use of water as to provide annually, from the net income thereof, for the payment of the interest and one per cent. of the principal of the loan fund and the expenses of operating the works. Although this results in distributing the water free, or for a merely nominal price, it cannot be properly said to be a usurpation of a franchise. At the most it is an improper use or abuse of power in the exercise of a franchise conferred upon them by the act of 1864. It is impossible to regard the act of establishing the water rates, from time to time, as the exercise of an independent franchise.

Upon this information, if any judgment is rendered against the defendant it would be a judgment of forfeiture of and ouster from the whole of the franchise. This the plaintiff does not claim. *People v. Turnpike Company*, 23 Wend. (N. Y.) 222; *People v. Bank of Hudson*, 6 Cow. (N. Y.) 217. This information does not allege such forfeiture, and does not pray for a judgment of forfeiture or ouster. Upon the whole we are of the opinion that this information cannot be sustained.

We have not felt called upon to consider whether, under our political system an information in the nature of a *quo warranto* can under any, and, if any, what, circumstances, be maintained against a city, town or other municipal corporation.

But the plaintiffs urge that this proceeding may be treated as a proceeding for general relief on the equity side of the court. If the necessary amendments were made to change it into an information or a bill in equity, we are of the opinion that still it could not be sustained. Whether, in this state, in the absence of any express grant of equity jurisdiction, the attorney general can bring a bill in equity to redress any public wrong or grievance, need not be decided. It is clear that such a bill cannot be sustained for relief against a private wrong. In this case, the grievance complained of is not a public wrong, in which every subject of the state is interested; and therefore cannot be redressed by a public prosecution or proceeding. *Wesson v. Washburn Iron Co.*, 13 Allen (Mass.) 95; *People v. Clark*, 53 Barb. (N. Y.) 172.

Demurrer sustained.

STATE EX REL. V. CITY OF LYONS.

1871. SUPREME COURT OF IOWA. 31 Iowa 432.

(INFORMATION in the nature of *quo warranto* filed by the district attorney on the relation of Buell, asking that respondent may be required to show by what authority a certain ordinance, vacating a portion of Main Street in said city, was passed. Respondent demurred and demurrer was sustained in the district court. Appeal.)

COLE, J. Our statute provides (Rev., § 3732), "an information may be filed against any person unlawfully holding or exercising any public office or franchise within this state, or any office in any corporation, created by the laws of this state, and when any public officer has done or suffered any act which works a forfeiture of his office, or when any persons act as a corporation in this state without being authorized by law, or, if being incorporated, they do or omit acts which amount to a surrender or forfeiture of their rights and privileges as a corporation, or when they exercise powers not conferred by law."

Our attention has not been directed to, nor have we been able to find, any case in the books where proceeding by *quo warranto*, or information in the nature thereof, has been entertained for the purpose of declaring void or annulling a legislative act, whether passed by a state or an inferior municipal legislature. It is not necessary for us to definitely determine in this case whether or not, under our statute, such a proceeding can, under any circumstances be maintained, since we ground our decision herein upon the special facts set forth in the information.

It appears by the clause of the act creating said city, as set out by the informant, that the city has power "to establish and locate streets and alleys, and to vacate the same, upon the petition of two thirds the value of the real property on both sides the street or alley where the change is desired." From this it is apparent that the city is clothed with the power to vacate streets, and, therefore, when the council passed the ordinance in question, they did not exercise powers not conferred by law. But, at the most which can be made from all the statements of the information, they were exercising a power conferred by law, in an improper and irregular manner. The statute does not authorize this proceeding for a mere irregular exercise of a conferred power, although such irregularity may be sufficient, when tested, to vitiate or render void the act done. Every clause of the section of the statute quoted shows that the proceeding by information is only authorized in the cases where the office, franchise or corporate authority is exercised in the absence of the vital element of power. If the *power* attaches, the *manner* of

its exercise cannot be challenged by information or *quo warranto*. Nor is it within the legitimate scope of the relief afforded by such proceedings to declare null and void what may have been done, but only to affirm, or adjudge as unauthorized the claim to the office, franchise or power which may have been theretofore, with or without color of right, unlawfully exercised; and in case of adverse claimants to award the office or franchise to him having the legal right thereto.

Affirmed.

4. Upon proceedings to test the right of incumbent to a municipal office, the court may inquire into the legality of the existence of the municipality.

STATE EX REL. READ v. WEATHERBY.

1869. SUPREME COURT OF MISSOURI. 45 Mo. 17.

CURRIER, J., delivered the opinion of the court.

This is a proceeding in the nature of a writ of *quo warranto*. The information alleges that the defendants have "unlawfully usurped and are now wrongfully holding and exercising the franchise of passing ordinances providing for the levy of taxes on the property of the inhabitants" of the town or village of Shelbyna, in the county of Shelby, under the false pretense that the "inhabitants of said town are a body politic and corporate, under and by virtue of the provisions of chapter 41, of the general statutes of the state of Missouri; that the defendants are also, in like manner, unlawfully exercising the franchise of appointing persons to collect such taxes, etc.", and prays that the defendants may be required to show by what authority of law these franchises are being exercised by them; that judgment of ouster may be awarded, a suitable fine imposed, and costs recovered. The return denies the alleged usurpations but admits the doing of the specific acts charged; and then proceeds to allege that the defendants were there in the proper and lawful exercise of the duties of "trustees of the inhabitants of the town of Shelbyna;" that the inhabitants of said town constitute a body politic and corporate, having been so "organized and established by virtue of the order of the county court of said Shelby County, made and entered of record on the fifth of March, 1867"; that the defendants were duly appointed or elected trustees of the corporation thus constituted, and that they have since exercised the franchise in question, in virtue of the "authority thus conferred" and "the authority contained in chapter 41 of the general statutes." A demurrer to the

return having been overruled, the relator replied, admitting that the Shelby county court, March 5, 1867, entered on its records an order declaring that the people of said town incorporated by the name of the "Inhabitants of the town of Shelbyna" and designating the metes and bounds of the said corporation. The reply then proceeds to allege that the order aforesaid was fraudulently made and procured on the part of the applicants therefor, and of the court granting it; setting out the particulars of said supposed frauds, and showing among other things, that the petition upon which the court acted in granting the order and entering it of record, was not as the law required it should be, signed by two thirds of the taxable inhabitants of said town. This is substantially the state of the pleadings. On the trial the relator offered evidence tending to prove the facts averred in the reply. This evidence was objected to and excluded on the ground that the order of the Shelby County Court, declaring the inhabitants of the town of Shelbyna a body politic and corporate, was judicial in its character and that until annulled it was conclusive of the existence of the facts required to be shown as a condition to the grant of the order, and for the further reason that the facts offered to be proved could alone be inquired into upon a proceeding against the inhabitants of the town in their corporate name.

1. The demurrer to the return was properly overruled. It was not necessary, in alleging the existence of the corporation, to set out the facts preliminary to the grant of the order, and upon which the order was founded. (12 Barb. (N. Y.) 573). The order, and not the antecedent facts, brought the corporation into being. The presence of these facts is to be presumed from the fact of the order, until the order itself is attacked and overthrown. The court had jurisdiction of the subject, and the propriety and regularity of its action is to be presumed until the contrary is shown. Its finding and judgment in the premises, until set aside, must be deemed conclusive of the main fact here sought to be drawn in issue. This principle is applicable to the acts and judgments of all courts of record having jurisdiction of the subject matter of such acts or judgment. (See *Kayser v. Trustees of Bremen*, 16 Mo. 88; *Betts v. Williamsburgh*, 15 Barb. (N. Y.) 255; 1 Greenleaf Ev., part 3, ch. 5.)

2. The question of the existence or the non-existence of the supposed corporation was put directly in issue by the pleadings, and, in my opinion, properly. The information alleges, and it proceeds throughout upon the theory that there was no such corporate existence as the defendants claim. The inquiry whether there was such a corporation, was not collateral but primary and direct. It is not charged that the defendants intruded into an office, but that they usurped a franchise—no corporation, and, consequently, no corporate office existing. In England a franchise is concisely defined to

be a "royal privilege in the hands of a subject." In this country it is defined as a *privilege of a public nature, which cannot be exercised without a legislative grant*. With us, therefore, the wrongful assumption of powers, which can alone be rightfully exercised when granted by the sovereign authority, is a violation of a sovereign franchise (Angell & Ames Cor. 697). The violation of such sovereign franchise is precisely what the defendants are charged with doing. They admit the assumption of the powers, but aver the grant of the authority. In other words, they allege the existence of the corporation (which the relator denies), and that they are legal officers of that corporation, and that as such they exercise the franchise in question. The controversy turns wholly upon the question of the existence or non-existence of the alleged corporation. The replication itself admits that existence *de facto* and *de jure* as well, for it admits the order calling the corporation into existence. That order is spread upon the records of the county court of Shelby County. It is regular upon its face, and is *prima facie* evidence, at least that the inhabitants of the town of Shelbina are a body politic and corporate. The record is unobjectionable upon its face, and the relator seeks to attack the corporation for matters *dehors* the record—matters *in pais*. He shows, in a word, that an existing institution had its origin in fraud, and that it ought not therefore, longer to continue. But this position is fatal to the theory and allegations of the information. This is not the Vernon County case at all. (*State ex rel. Douglass v. Scott*, 17 Mo. 521.) There the supposed corporation never had even a *prima facie* existence. The act which proposed to establish the new county was held unconstitutional and void. It was a nullity from the beginning; it was as though no such act had ever been passed. Not unlike this is the case from Massachusetts (*Commonwealth v. Bowler*, 10 Mass. 295). Both cases sustain the theory of the relator's information; but the theory of the information and the facts stated in the replication are in conflict, and cannot stand together. If the pleadings and evidence offered affirmed the proposition that no corporation existed, either *de facto* or *de jure*, then the relator would be entitled to judgment. But facts which go to show simply that the corporation ought never to have existed, do not sustain the allegations that it never did exist. Where one of these minor municipal corporations, contemplated by the statute, is found in apparent legal existence and in operation with the order of court establishing it regular and proper upon its face, the holding of it to be a mere nonentity because of matters antecedent to the order, could not fail to be unjust and mischievous in its effects upon innocent and morally unoffending parties. It is true that these inconvenient consequences do not determine the state of the law. It is proper to take them into consideration, however, as an inducement to cautious and circumspect judicial action.

3. But the relator insists that the statute (Gen. St. 1865, ch. 41) provided for the incorporation of towns, under which the Shelby County Court acted, is unconstitutional, and therefore void, and consequently that the order of the county court based on that statute, is, upon its face, void and of no effect. This enactment, substantially in its present form, has been upon the statute books of the state for some forty years. Its operation has been useful and beneficent, and its provisions are in harmony with the policy of American legislation on the subject therein embraced; and, what is more to the purpose, the constitutionality of the enactment has been passed upon and definitely settled by a prior adjudication of this court. The point was distinctly made and clearly adjudicated in *Kayser v. Bremen*, 16 Mo. 88. We are satisfied with that decision and have no disposition to disturb it.

The other judges concurring, the judgment of the court below is affirmed.

See also, *State v. Goowin*, 69 Tex. 55; *People v. Carpenter*, 24 N. Y. 86; *People v. Draper*, 15 N. Y. 532; *State v. McReynolds*, 61 Mo. 203; *State v. Parker*, 25 Minn. 215.

But see *Rex v. Saunders*, 3 East, 119, opinion of Lord Ellenborough, and *State v. North*, 42 Conn. 79.

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5. To test the legality of the exercise of corporate powers outside of municipal boundaries.

PEOPLE EX REL. ATTORNEY GENERAL V. CITY OF OAKLAND.

1891. SUPREME COURT OF CALIFORNIA. 92 Cal. 611, 28 Pac. 807.

(ACTION in the nature of *quo warranto* brought by the attorney general against the city of Oakland. The information alleged that the city was duly incorporated by a special act of the legislature in 1854. In 1889 a new charter was adopted and in it the boundaries of the city were defined. Prior to the ratification of this charter by the legislature, additional territory had by vote of the people been annexed but such territory was not included in the description contained in the new charter. The city proceeded to govern and tax the inhabitants of said annexed territory and these acts furnish the basis of the complaint. Judgment in lower court for plaintiff.)

VANCLIEF, C. (after reviewing the facts at some length). * * *

1. The first point made for the appellant is that *quo warranto* is not the proper remedy. Section 803 of the Code of Civil Procedure provides: "An action may be brought by the attorney general, in the name of the people of this state, upon his own information, or

upon the complaint of a private party, against any person who usurps * * * or unlawfully holds or exercises * * * any franchise within this state." No doubt a municipal corporation is a person in the same sense in which the word is used in this section. Pol. Code § 17. The facts found according to stipulation of parties show that the city of Oakland is a municipal corporation, and as such claims and exercises the right and power to govern and tax the inhabitants of certain territory in addition to that described in its charter. The right and power thus claimed and exercised is a franchise in addition to and distinct from that of being a corporation. (*Gas Co. v. January*, 57 Cal. 616; *Spring Valley W. W. v. Schottler*, 62 Cal. 106-109; *Memphis & L. R. R. Co. v. Commissioners*, 112 U. S. 619, 5 Sup. Ct. Rep. 209; *Pierce v. Emery*, 32 N. H. 507; *Williamette Woolen Manufacturing Company v. Bank of British Columbia*, 119 U. S. 191, 7 Sup. Ct. Rep. 187); and the exercise of such power by a municipal corporation over the inhabitants of territory outside its charter limits is the usurpation of a franchise, for which the attorney general is authorized to bring an action in the name of the people. * * *

(The court—after holding that the description of the territory in the charter as approved and ratified by the legislature, was an essential part of said instrument and superseded all prior charters, or amendments thereto,—affirmed the decision below.)

In accord.—*People v. Reclamation Dist.*, 130 Cal. 607; *Frey v. Michie*, 68 Mich. 323; *State v. Fleming*, 147 Mo. 1; *East Dallas v. State*, 73 Tex. 370; *State v. Board, etc.*, 66 Minn. 519; *People v. City of Peoria*, 166 Ill. 517, 522; *State v. Dimond*, 44 Neb. 154.

Contra.—

STULTZ ET AL. V. THE STATE EX REL.

1879. SUPREME COURT OF INDIANA. 65 Ind. 492.

(INFORMATION filed by the attorney general alleged that the city of Huntington had unlawfully annexed certain territory and was exercising the powers of a municipality over the same and taxing and governing the inhabitants thereof. Demurrer overruled.)

Howk, C. J.—(After stating the facts and examining the facts of alleged usurpation.) * * *

It will be observed, however, that it was not alleged in the information, that the appellants were not the lawfully elected and qualified mayor, councilmen, clerk, treasurer, and marshal of a city, say of the city of Huntington, duly organized and incorporated under

the general laws of this state for the incorporation of cities. In the absence of such an allegation, it seems to us that we may fairly assume that the appellants were such officers of such an incorporated city, and that, as such officers, they might of right lawfully do, exercise and perform, within the limits of such city, all such acts as such officers were authorized by law to do, exercise and perform. If the appellants were such officers of such city, it cannot be said, we think, that the appellants, or either of them, had usurped, intruded into or unlawfully held or exercised their respective public offices, merely because they had done, and claimed the right to do, within the territory described in the information, all such acts as such officers, of duly organized cities, might of right do within the corporate limits of such cities, even though such territory may not have been within such city limits. It is not alleged, in either paragraph of the information, that the appellants had usurped, intruded into or unlawfully held or exercised the public offices therein mentioned; but the allegation was in each paragraph, that they had done and then claimed the right to do, within the territory described therein, all such acts as the incumbents of such public offices, in duly organized cities, might of right do under the law. Our conclusion is, that the appellee's information does not state a case which is warranted or authorized by any of the provisions of section 749 of the practice act.

It is evident, we think, that the object of this suit was to obtain a judgment, declaring that the territory described in the information was not lawfully within the corporate limits of the city of Huntington. In our opinion, an information in the nature of a *quo warranto* will not lie to determine this question. If the territory described was not lawfully taken within, or annexed to, the town or city of Huntington, and if the appellants as the officers of such city, unlawfully performed, and claimed the right to perform, official acts within or over such territory, their acts would be unauthorized and illegal, and they could be enjoined therefrom in a proper suit, brought for that purpose. But we are clearly of the opinion, that the legality of the proceedings, whereby the territory in question was taken within, or annexed to the city of Huntington, can not be tried and determined, under the provisions of our code, in or by an information in the nature of a *quo warranto*. In High, Extraordinary Legal Remedies, section 618, it is said that, where a public officer threatens to exercise the functions of his office beyond its territorial limits, "the proper remedy would seem to be by injunction, rather than a *quo warranto* information. Thus the information will not lie to prevent the legally constituted authorities of a city from levying and collecting taxes beyond the city limits, under an act of the legislature extending the limits, and the constitutionality of such an act cannot be determined upon a *quo warranto* in-

formation." This doctrine is fully sustained by the case cited in the footnote of *The People ex rel. v. Whitcombe*, 55 Ill. 172.

In section 617 of the same excellent treatise the rule is laid down that a *quo warranto* information will not lie, where the party aggrieved can obtain full and adequate relief in the usual course of proceedings at law, or by the ordinary forms of civil action. The State *ex rel. v. Marlow*, 15 Ohio St. 114. "Nor is the rule as here stated, limited to cases where the relief may be attained in the ordinary forms of common law actions, but applies also to cases where the grievance may be redressed by bill in equity, and the existence of an adequate remedy in equity would seem to be a sufficient objection to entertain proceedings by information". The People *ex rel. v. Whitcombe*, *supra*; The People *ex rel. v. Ridgely*, 21 Ill. 64.

This rule was exercised by this court, in the case of the State *ex rel. v. Shields*, 56 Ind. 521, in which it was held that a *quo warranto* information would not lie to determine the title to certain real estate, used for school purposes, as between two school corporations.

In section 589 of High Ex. Leg. Remedies, it is further said:—"While the principles thus far established indicate the tendency to a somewhat liberal use of *quo warranto* informations, as a means of correcting the usurpation of corporate privileges, the courts will not entertain such informations for the purpose of interfering with or declaring void the legislative action of a municipal body, such as the common council of a city. The power of municipal legislation being properly vested in such a body, the courts will not permit the use of this remedy to inquire into or challenge the manner in which this power has been exercised, nor is it within the legitimate scope of the proceeding by information to declare null and void legislative acts of such a body. Nor will the charter of a municipal corporation be forfeited by proceedings upon an information, because of the passage by the corporate authorities of an alleged illegal ordinance in which they have transcended their powers, the offence charged being at the most but an error of judgment, rather than a wilful abuse of power." The State *ex rel. v. The City of Lyons*, 31 Iowa 432; The State *ex rel. v. The Town Council of Cahaba*, 30 Ala. 66.

In the case of the City of Peru *v. Bearss*, 55 Ind. 576, which was a suit by the appellees, against the appellant, to enjoin the collection of certain taxes, assessed by the corporate authorities of the city of Peru on certain real estate, claimed by the appellees to have been illegally annexed to, and therefore not legally within the said city, it was held by this court, in substance, that the only adequate remedy for persons aggrieved by such annexation, was afforded by a suit, such as the one then before us, to enjoin the city authorities from assessing and collecting taxes on such illegally annexed territory, from the owners thereof or the residents therein. The doc-

trine of the case cited has been approved and followed by this court, in the more recent case of *Windman v. The City of Vincennes*, 58 Ind. 480.

It may be said and has been said by the learned counsel of the appellee, in this case, that the views expressed in this opinion are not applicable to the case, such as this, of a *quo warranto* information by the state, on the relation of the prosecuting attorney. To this we answer, that, under the legislation of this state in relation to *quo warranto* informations, the state, by its attorneys, occupies no higher or better position, than any interested citizen. An information by the state, on the relation of the prosecuting attorney, must state a case fairly within the purview and meaning of the statute, or the state, by its attorney, will take nothing by the suit.

In our opinion, the court below erred in overruling the appellants' demurrer to the appellee's application.

Having reached the conclusion that the appellee's information was insufficient on the demurrer thereto, we need not now consider the other errors assigned, which call in question the sufficiency of the different paragraphs of the appellants' answer.

The judgment is reversed and the cause is remanded, with instructions to sustain the appellants' demurrer to the appellee's information.

Reversed and remanded.

In accord.—*People v. Whitcomb*, 55 Ill. 172; *City of Peru v. Bearss*, 55 Ind. 576.

If the exercise of municipal powers over territory unlawfully annexed is treated as an usurpation of corporate franchises on the part of the municipality, *quo warranto* would seem to be the proper remedy. It is certainly an anomaly in our jurisprudence when courts deny the purely legal remedy in *quo warranto* because the equitable remedy of injunction may furnish relief.

6. Appropriate remedy to try title to public office.

See *Darley v. Queen*, 12 Cl. & Fin. 520; *supra*, Page 250.
Also *State ex rel. Vance v. Wilson*, 30 Kan. 661; 2 Pac. 828; *supra*, Page 271.

OSGOOD v. JONES.

1881. SUPREME COURT OF NEW HAMPSHIRE. 60 N. H. 543.

(COMPLAINANT was treasurer of Merrimack county, his term of office extending until June 30, 1881, and until his successor shall be chosen and qualified. November 2, 1880, an election for a successor was held, at which complainant and defendant were candidates. The election judges declared defendant elected and issued to him a

certificate of election. Whereupon complainant filed this bill in equity, alleging illegal and fraudulent votes were cast and counted for the defendant, that he is informed and believes that defendant, although not legally elected to said office, claims to have been elected and threatens and intends to enter upon the same and discharge the duties of treasurer. The bill prayed for an injunction to restrain the defendant from assuming the said office, etc. Defendant demurred.)

J. Y. MURGRIDGE, for the plaintiff. The court, as a court of equity, has jurisdiction in this case. The process is a bill in equity *quia timet*. It alleges, in substance, that the plaintiff is treasurer of Merrimack county, and is rightfully in possession of that office, and that he is by law entitled to hold the same until another person is legally chosen in his place; also, that the defendant is not legally chosen, but wrongfully threatens to assume the duties of the office after June 30th, and the plaintiff fears that he may harass and vex him in the discharge of his duties of his said office and by his conduct cause great wrong and mischief to the plaintiff; and an injunction is asked to prevent such consequences.

The plaintiff "seeks the aid of a court of equity because he fears some future probable injury to his rights or interest, and not because an injury has already occurred which requires any compensation or other relief." The bill is to "accomplish the ends of precautionary justice", and should under the well established principle of equity proceedings, be entertained by the court. 2 Story Eq. Jur. s. 826; Walker v. Cheever, 35 N. H. 339; Wells v. Pierce, 27 N. H. 503, 512.

CHASE & STREETER for the defendant. High, in his work on Injunctions, s. 1312, says:—"No principle of the law of injunctions, and perhaps no doctrine of equity jurisprudence, is more definitely fixed, or more clearly established, than that courts of equity will not interfere by injunction to determine questions concerning the appointment of public officers, or their title to office, such questions being of a purely legal nature, and cognizable only by courts of law. A court of equity will not permit itself to be made the forum for determining disputed questions of title to public offices, or for the trial of contested elections, but will in all such cases leave the claimant of the office to pursue the statutory remedy, if there be such, or the common law remedy by proceedings in the nature of a *quo warranto*". He cites the following authorities to this proposition: People v. Draper, 24 Barb. 265; s. c. 4 Abb. Pr. 322, and 14 How. Pr. 233; Moulton v. Reid, 54 Ala. 320 (a case similar to this), to which we ask particular attention; Beebe v. Robinson, 52 Ala. 66; Planters Compress Association v. Hanes, 52 Miss. 469; Tappan v. Gray, 9 Paige Ch. 507, affirmed 7 Hill. 259; Sheridan v. Colvin, 78 Ill. 237; Patterson v. Hubbs, 65 N. C. 119; Jones v. Commis-

sioners, 77 N. C. 280; Colton v. Price, 50 Ala. 424; Delehanty v. Warner, 75 Ill. 185; Dickey v. Reed, 78 Ill. 261.

In the last case cited (Dickey v. Reed) the court says: "We are aware of no adjudged case, or text writer, who has ever announced the power as inherent in the courts of equity to try contested questions between persons claiming an office. It is believed that no case can be found where an English court of Chancery has ever tried a contested election where the public were concerned; and such cases are believed to be of rare occurrence in this country, and then only when the power has been conferred by express enactment, or necessary implication therefrom." In other cases herein cited the courts use similar language. See also Pierce, R. R. 27; Dillon Mun. Cor. ss. 714, 210; 2 Kent, 314; Mc. Cr. Elect, ss. 220, 458; High Ex. Rem. ss. 619, 641; Boren v. Smith, 47 Ill. 482, 485; People v. Wiant, 48 Ill. 263; Moore v. Hoisington, 31 Ill. 243; Cochran v. McCleary, 22 Ia. 75, 86, in which Judge Dillon, delivering an opinion of the court says, "The court of chancery goes so far as to hold that it will not interfere, before a trial at law, in favor even of an officer *de jure* against an illegal claimant, by enjoining the latter from exercising the functions of the office." Markle v. Wright, 13 Ind. 548.

In Detroit v. Board of Public Works, 23 Mich. 546, Judge Cooley, after stating that the ground of the application for the injunction is to prevent irremediable mischief, says "I presume we may assume that in the generality of such controversies the respondent party is as often found to be in the right as his adversary. To sustain the bill, therefore, we must hold that equity may take cognizance of a controversy, when the ground of interference is, not the question involved, but some anticipated injurious result, which is just as likely to be caused by the interference as prevented by it. Such holding, I think, would be without reason, and so far as I am advised, it would be without precedent." See also Hagner v. Hayberger, 7 W. & S. 104; Hulseman v. Rems, 41 Pa. St. 396; Updegraff v. Crans, 47 Pa. St. 103; Hullman v. Honcomp, 5 O. St. 237; Sherman v. Clark, 4 Nev. 138.

We do not remember ever to have examined a question where the authorities were so numerous, so generally scattered over the country, so uniform, and so clear as they are upon this question. Some of them are very similar to the case under consideration. Moulton v. Reid, *supra*, and Updegraff v. Crans, *supra*. We cannot say that there [are] no authorities the other way, for we do not suppose that we have found all the cases in which the question has arisen, but so far as we have examined we have found none. If any exist, we trust our opponents will call attention to them. In Hughes v. Parker, 20 N. H. 58, this principle as applicable to contests about the title to offices, in private corporations, is distinctly recognized. It

will be seen from some of the foregoing authorities, and from what is hereinafter said, that there are stronger reasons for the application of the rule in cases pertaining to public offices than in cases pertaining to the offices of private corporations, and that the rule governs both classes of cases.

Equity has no enlarged jurisdiction in this state differing from that at common law, or that in most of the other states. Our court of equity "undoubtedly has full chancery powers, and will administer relief in all cases falling within equity jurisdiction where the statutes have not provided other means of redress." But the foregoing authorities, both text writers and court, unanimously hold that questions of the kind under consideration do not fall within equity jurisdiction, are not within the chancery powers of the courts, but belong exclusively to courts of law, which furnish a plain and adequate remedy therefor. We ask attention, in this connection, to the briefs furnished by us in the case that was between these parties, that was before the court at the last December Term; and as to the opinion of the court in that case—*ante* 282.

According to the decisions in this state, a court of equity will not interfere in cases of disputed rights about property, until those rights have been determined at law, except to prevent irreparable injury or a multiplicity of suits. *Coe v. Lake Co.*, 37 N. H. 254; *Burnham v. Kempton*, 44 N. H. 78; *B. & M. R. R. Co. v. P. & D. R. R. Co.*, 57 N. H. 200. If irreparable injury would result to one of the parties to this action by the other's taking possession of the office in question without right, such injury is quite as likely to follow from the issuing of an injunction as from withholding it; for, until this contested election is settled, it cannot be determined who is entitled to the office. If the defendant is legally entitled to the office, the possession of it by the plaintiff would cause irreparable injury to the defendant in the same way and to the same extent that the defendant's possession of it would to the plaintiff if he is legally entitled to it. Where it is uncertain whether irreparable injury will be prevented or caused by the interference of a court of equity, it will not act. But we maintain that the plaintiff or the public is not liable to suffer irreparable injury, even if the plaintiff is entitled to the office in question, by the defendant's possession of the office, until the plaintiff's right to it is established by an action at law. The defendant, being in possession of it under a color of title,—namely, the declaration of the vote in his favor by the court will be an officer *de facto*, and his acts will be valid so far as the public and third persons are concerned. *Prescott v. Hays*, 42 N. H. 58; *State v. Butman*, *ib.* 494; 2 Dill. Mun. Cor., s. 892, n. He cannot take possession of the office until he gives a bond for the faithful discharge of his duties. G. L., c. 26, s. 1. The plaintiff can maintain an action for money had and received against him for the salary that he re-

ceives while in possession of the office without right. 2 Saund. Pl. & Ev. 670; Boyter v. Dodsworth, 6 T. R. 681.

It is not claimed that the defendant is not amply able to respond to any judgment that may be recovered against him in such action. So the public and the plaintiff are fully protected against any injury.

It may be said that two suits at law might be required to enable the plaintiff to get his rights—one to get possession of the office, and the other to get possession of the salary; but these would not constitute a multiplicity of suits within the meaning of the law. Burnham v. Kempton, 44 N. H. 95.

If the subject in dispute in this case was property (using that word in its common significance), and all the elements existed in the case that exist in this case, a court of equity would not assume jurisdiction of it, but would send the parties to the law court to settle their controversy. But this suit does not relate to property; the title to a public office dependent upon the votes of the people is the subject in controversy. It is not a fit subject for equity jurisdiction. Equity cannot try the question any more speedily, fully, or fairly than a court of law can. It would not ordinarily arrive at a decision of the question before the term of office begins, even in cases like the present. The evidence in such cases is likely to be voluminous and conflicting, such as a jury is better able to weigh and decide upon than a chancellor. If equity takes jurisdiction, its writ of injunction will be frequently sought after, and often obtained. The excitements of elections will be continued and augmented by such proceedings (People v. Galesburg, 48 Ill. 489), and the court will be burdened with controversies that would not otherwise arise. It is better that parties should be confined to their legal remedies, even though they seldom avail themselves of such remedies, for the reason that such decisions are not arrived at until the term of office has partly expired. It is better that political controversies and excitement should cease with the elections, even though some officers *de facto* be not officers *de jure*. Cooley Cons. Lim. 626, *et seq.* And if a few months intervene between the elections and the time when the parties can controvert the results, cool candid judgment may take the place of passion, and the peace of the community be greatly benefitted thereby. We submit that the rule as laid down by High, and supported by such weight and authority, is particularly adapted to our election laws, as we find them at present, and we urge that it be followed in the present case.

In High, Ex. Rem., s. 641, he says, "Since this remedy (*quo warranto*) is applicable the moment the office or authority is usurped, an injunction will not lie to restrain the exercise of official functions, even though there has been no actual entry upon the office. In such case, the party aggrieved should wait until an actual at-

tempt is made to exercise the functions pertaining to the office, and then pursue his legal remedy by *quo warranto*."

SMITH, J. The usurpation of a public office or a public franchise is a public wrong. The remedy is, therefore, a public one, carried on in the name of the public prosecutor by an information in the nature of a *quo warranto*.

In the absence of statutory regulations, the common law rule prevails, requiring the proceedings to be instituted in the name of the state by the attorney general. A private citizen is not allowed to file the information in his own name, and of his own volition, for the law does not contemplate the use of this remedy by individual citizens to redress the wrongs of the state. The process is regarded as in the nature of a civil remedy, but retains the form of a criminal proceeding, so far at least as concerns the parties prosecuting, and the title of the cause. High Ex. Rem., s. 697; Sir William Lowther's case, 2 Ld. Raym. 1409; Wright v. Allen, 2 Tex. 158; Murphy v. Bank, 20 Pa. St. 415; Commonwealth v. Burrell, 7 Pa. St. 34; United States v. Lockwood, 1 Pinn. (Wis.) 359; Clearly v. De-liessline, 1 McCord 35; State v. Schinerle, 5 Rich. 299; Lindsey v. Attorney General, 33 Miss. 508; State v. Gleason, 12 Fla. 190; State v. Company, 1 Zab. (N. J.) 9; *In re* Bank of Mount Pleasant, 5 O. 249; State v. Moffitt, 5 O. 358; 3 Bl. Com. 262, 263; People v. Utica Ins. Co., 15 Johns. 358; People v. Ridgeley, 21 Ill. 66; People v. Holden, 28 Cal. 123.

The principle is a familiar one, that equity will not interpose to afford relief where full redress can be had at law. A *quo warranto* information is a specified legal remedy to test the right to a public office, and affords a full and adequate remedy. It is applicable the moment the office or authority is usurped. *It therefore is held to oust all equitable jurisdiction in such a case, and no injunction can be granted to restrain the exercise of official functions.* High Ex. Rem. s. 641. The authorities in support of this rule are numerous and uniform. 1 Dillon Mun. Cor. s. 272; 2 Dillon Mun. Cor. s. 890; 2 Kent 314; Pierce R. R. 27; Hughes v. Parker, 20 N. H. 58, 72; Updegraff v. Crans, 47 Pa. St. 103; Attorney General v. Insurance Company, 2 Johns. Ch. 371, 376; People v. Insurance Co., 15 Johns. 358, 378, 379; Demarest v. Wickham, 63 N. Y. 320; see also cases cited by the defendant, and extract from the opinion in Dickey v. Reed, 78 Ill. 261, quoted in the defendant's brief.

It would seem to be a fatal objection to the maintaining of this bill that the state is not represented. This is a controversy between two persons, each claiming that he was elected to the office. Whatever our decision might be if this bill is maintained, the state by its prosecuting officer might go over the ground again on a *quo warranto* proceeding. It is not an answer to this objection to say that the bill may be amended by inserting the name of the attorney gen-

eral as prosecutor, for he may not elect to become a party, or to adopt this process.

Equitable relief is not afforded where the title to property merely is involved, and where no irreparable injury appears until the plaintiff's title has been established at law. *Burnham v. Kempton*, 37 N. H. 485; *Hodgman v. Richards*, 45 N. H. 28. Much less should a remedy in equity be afforded to one who volunteers to redress a public wrong, without first having established his right to the office, which he claims has been usurped. A full and adequate remedy at law is available to the state whenever its prosecuting officer shall see fit to set on foot the process provided by law for determining whether a public wrong has been sustained.

No reason has been suggested why a bill in equity has any advantages over the common law proceeding of *quo warranto* for determining the result of a contested election. We discover no reason why we should depart from the beaten path. The proceeding by *quo warranto* has had the approval of the best legal minds for generations. It is simple, expeditious, and under the control of such legal ability as the state is able to command in the person of its principal prosecuting officer. By refusing to sanction this innovation on the ancient mode of proceeding, we believe the result will be on the one hand to discourage unnecessary litigation, and on the other that not only public but individual rights will be fully protected.

Demurrer sustained.

DOE, C. J., dissented. STANLEY, J., did not sit; the others concurred.

See also, *Griebel v. State*, 111 Ind. 369; *Williams v. State*, 69 Tex. 368; *State v. Meehan*, 45 N. J. L. 189; *Davidson v. State*, 20 Fla. 784; *French v. Cowan*, 79 Me. 426; *Collins v. Huff*, 63 Ga. 207; *People v. Callaghan*, 83 Ill. 128; *People v. Sweeting*, 2 Johns. (N. Y.) 184; *Farrington v. Turner*, 53 Mich. 27; *State v. Stein*, 13 Neb. 529; *State v. Brown*, 5 R. I. 1; *Montgomery v. State*, 107 Ala. 372; *Rhodes v. Driver*, 69 Ark. 606; *People v. Scannell*, 7 Cal. 432; *Wason v. Major*, 10 Colo. App. 181; *Attorney-General v. Sullivan*, 163 Mass. 446; *Peters v. Bell*, 51 La. Ann. 1621; *State v. Minton*, 49 Iowa, 591; *Place v. People*, 192 Ill. 160, 165; *Tillman v. Otter*, 93 Ky. 600; *Tarbox v. Sughrue*, 36 Kan. 225; *State v. May*, 106 Mo. 488; *People v. Holcomb*, 5 Misc. (N. Y.) 459; *State v. Withers*, 121 N. Car. 376; *Republica v. Wray*, 3 Dall. (Pa.) 490; *Williams v. State*, 69 Tex. 368; *State v. Cunningham*, 83 Wis. 90; *State v. McGeary*, 69 Vt. 461; *State v. O'Brien*, 47 Oh. St. 464; *Gilroy's Appeal*, 100 Pa. St. 5; *Palmer v. Foley*, 45 How. Pr. (N. Y.) 110; *Hull v. Superior Court*, etc., 63 Cal. 174.

As to what constitutes a public office, see *Darley v. Reg.*, 12 Cl. & F. 520; *supra*, p. 250.

While the writ will not lie to try title to an office which has no legal existence (*State v. North*, 42 Conn. 79, 87), yet where one assumes to hold an office by virtue of an unconstitutional statute the writ will be granted. *Hinze v. People*, 92 Ill. 406; *People v. Gartland*, 75 Mich. 143; *State v. Uridil*, 37 Neb. 371; *State v. Jones*, 16 Fla. 306; *State v. Scott*, 17 Mo. 521; *Commonwealth v. Denworth*, 145 Pa. St. 172, 177; *State v. Riordan*, 24 Wis. 484.

ATTORNEY GENERAL EX REL. BASHFORD v. BARSTOW.

1855. SUPREME COURT OF WISCONSIN. 4 Wis. 567.

(ARGUMENTS of counsel and opinions of court on preliminary questions are omitted. Only such portions of the final opinion are given as relate to the jurisdiction in *quo warranto* directed to the governor.)

By the court, COLE, J.—

Before passing upon the motion which has been made for a judgment of ouster against the respondent, and establishing the right of the relator to the office mentioned in the information filed in the cause; and also upon the motion of the attorney general made yesterday, to dismiss all further proceedings herein; before, I say, passing upon these motions, I deem it proper to review the proceedings thus far had, and with as much brevity as possible, place upon the records my reasons for thinking that the court has properly entertained jurisdiction of the cause, and has the power to give a final judgment. I do not propose entering upon an extended discussion of many of the questions raised before us, and shall refrain from elaborating any view taken by the court in the decisions already given. Some repetition may unavoidably occur, but no more I hope, than necessary to make my observations clear and intelligible.

On the 15th day of January, 1856, the attorney general, the law officer of the state, filed in this court an information in the nature of a writ of *quo warranto* upon the relation of Coles Bashford, giving the court to understand and be informed that the respondent for the space of one day and upwards then last past, had held, used and exercised, and still did hold, use and exercise the office of governor of the state of Wisconsin without any legal election, appointment, warrant or authority therefor; and that at a general election of the state officers of said state in the several counties thereof, on the 6th day of November, 1855, the relator was duly elected and chosen governor of the state aforesaid, and that the said relator hath ever since the seventh day of January, 1856, and still is, rightfully entitled to hold, use and exercise the said office; which said office of governor as aforesaid, the respondent on the said seventh day of January, usurped, intruded into and unlawfully held and exercised, and still doth usurp, intrude into and unlawfully hold and exercise, in contempt of the people of this state, and to their great damage and prejudice; and prayed for due process of law against the respondent in this behalf to be made, to answer the said people by what warrant he claims to hold, use, exercise and enjoy the office of governor of this state.

In compliance with the prayer of this information, a summons in

due form was issued, returnable on the fifth day of February, 1856, which summons was returned served according to law.

On the 22d day of January, the relator by his counsel, filed a motion to discontinue the information filed by the attorney general, and for leave to file in lieu thereof, an information in the nature of *quo warranto* upon his own relation, different from the one already filed, and for liberty to prosecute and control the same, by himself or counsel as he should be advised; and for such other or further order as the court should deem proper in the premises.

This application was based upon two grounds: 1st. That the attorney general having refused to file a special information prepared by the relator, but filing a different one, the relator's right to file one on his own relation and prosecute it to final judgment became perfect under the act of 1855, ch. —; and 2d.—An alleged hostility or unfriendliness upon the part of the attorney general to the interests, rights and success of the relator. The motion was resisted on argument by the attorney general on behalf of the state, and by the counsel for the respondent who that day entered his appearance in the cause. The motion was overruled, the court holding upon the first point that the attorney general had substantially complied with the act of 1855, in filing an information adequate to all the purposes of the suit; and upon the second point, that the attorney general might control the proceeding so long as he prosecuted with fidelity; but if he should act in bad faith toward the relator, or attempt to fritter away his rights, the court would interfere for the protection of them.

On the 25th a rule was entered by the attorney general requiring the respondent to plead to the information in such time as the court should direct. The court required the respondent to plead on or before the fifth day of February then next ensuing.

On the 2d day of February, the counsel for the respondent filed their motion to quash the summons issued herein, and to dismiss the same and all proceedings, for the reason that the court had no jurisdiction in the premises. By order of the court, the argument of this latter motion came on for argument on February 11, and the counsel for the respondent then endeavored, with great zeal and earnestness, to sustain their motion, by insisting upon and establishing the position, that even where there is an usurpation of the office of governor of the state, by a person not lawfully entitled to exercise its duties, this court has no constitutional power to entertain a proceeding for his removal, but that the person so intruding could only be reached and removed by revolutionary force. This doctrine appeared to me bold and startling when advanced, and does still, for the reason, probably, that I had supposed we were living under a constitutional government, and had a peaceable redress for a political evil of this sort. The court thought the proposition an unsound

one, and overruled the motion, deciding the principle, *that where there was an intrusion without color of right, even into the office of the governor of this state, it had the power of entertaining a proceeding to inquire into the right of a person thus holding the office. and to remove the intruder.*

On the 25th of February, the respondent filed a plea in abatement to the jurisdiction of the court, setting forth in said plea, that by the laws of the state of Wisconsin, regulating the manner of conducting general elections, and the canvas of votes thereat applicable to the election stated in the said information, it became and was the duty of the board of state canvassers, upon a statement of the whole number of votes given at said election, and for whom given for the said office of governor to be by them made, and certified to be correct, and subscribed by their names, to determine what person was, by the greatest number of votes, duly elected to said office, and to make and subscribe on such statement, a certificate of such determination, and deliver the same to the secretary of state, and thereupon it became and was the duty of the said secretary of state, without delay, to make out and transmit to the person thereby declared to be elected to the office of governor, a certificate of his election, certified by him under his seal of office; that in fact Alexander T. Gray, secretary of the state, Edward H. Jansen, State Treasurer, and George B. Smith, attorney general, who then constituted the said board of state canvassers, met together at the office of the secretary of state, in the capitol at Madison, on the 15th day of December, 1855, the day duly appointed pursuant to law for that purpose, and did proceed according to law to make a statement of the whole number of votes given at said election, for the said office of governor, showing the names of the persons to whom such votes were given for said office, and the whole number given to each one, distinguishing the several counties in which they were given, and did certify such statement to be correct, and subscribed their names thereto, and that they did thereupon determine and certify that by the greatest number of votes polled at said election, the respondent was duly elected to said office, of governor, for the term of two years, commencing on the first Monday of January, 1856, and that they did, in pursuance of law, make and subscribe on such statement a certificate of such determination, in due form of law, and did duly deliver the same to the secretary of state; and that thereupon, in pursuance of law, the said secretary of state did make out and transmit to said respondent, a certificate of his election to the said office of governor, of said state for the term aforesaid, in due form of law, and duly certified by him under his seal of office. And that said certificate was duly received by said respondent, who thereupon duly qualified himself, by taking the customary and proper oath of office as such governor, and entered into the possession of such office as he

lawfully might; duly certified copies of which said statement and certificates authenticated under the great seal of the state, the respondent here in court produces and shows to the court. Certified copies (under the seal of the secretary of state) of the statement made by the board of state canvassers, of the official oath of the respondent, and of the certificate of election, accompanied this plea as exhibits. The plea was demurred to, several clauses of demurrer being assigned. *The demurrer was sustained upon the ground that the matters contained in the plea, if good at all, should be pleaded in bar to the action, and did not go to the jurisdiction of the court.* Consequently judgment of *respondeas ouster* was given on the demurrer, and the respondent had four days, until the eighth instant to file his plea in bar. He had purposely made default. On the eleventh, the counsel for the relator moved for final judgment. While this motion for judgment was under advisement, the attorney general, on the eighth instant, filed a motion to discontinue the proceeding, and this motion is resisted by the relator. I have been thus minute in giving a full history of the cause; have stated the motions made therein as it progressed, and given the rulings of the court, in order that we might have the whole case fairly before us. We now see what has been done, and we now naturally arrive at the important question involved in the case, that is, whether the court in entertaining this proceeding has usurped a power not given to it by the constitution and laws of the state? If it has, the path of duty is plain. It should go no further but retrace its steps, and cease to make encroachment upon the other powers of the government. But, if in all this matter, it has exercised a function delegated to it by the constitution; if it has proceeded in this, as in all other cases which come before it, merely in the discharge of its appropriate duty, of determining and settling the rights of parties, and not creating these rights, then it must go forward to judgment, however unpleasant and delicate a duty that may be, and regardless of any and all consequences that may result from its constitutional action. All that we can know is our duty. We cannot look beyond that. Here we must firmly stand to our public trusts, until the constitution falls about us in the ruins. And it may not be altogether inappropriate, after what has fallen from counsel in court, and imputations made elsewhere, for me to say that I enter upon this discussion with all the candor and impartiality I am able to exercise, and with the directness that the gravity of the subject demands. I am deeply sensible of all my responsibility at this moment. I am unconscious of any partisan bias or personal prejudice that could warp my judgment, or cloud my understanding, and least of all, have I any desire to extend the jurisdiction of this court one hair beyond its constitutional limits. * * *

Section 1 of this statute (Ch. 126 R. S.) provides that "an

information in the nature of *quo warranto* may be filed in the supreme court, either in term time or vacation, by the attorney general, against individuals, upon his own relation, or upon the relation of any private party, and without applying to such court for leave, in either of the following cases:

"1st. When any person shall usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise within this state, or any office in any corporation created by the authority of the state." The subsequent sections of the statute make ample provisions by which the proceeding can be prosecuted to judgment, and authorize the court to pass as well upon the right of the respondent to hold the office, as upon the right of the person setting up his claim thereto. The scope and object of the statute evidently is, to provide a method by which contestants to office could try their respective rights. Then is the office of the governor, which is now in controversy, a public and civil office within the meaning of the statute? We have already decided that it was, and the chief justice has stated the grounds of that opinion. The reasons for considering the office of governor a civil office, under the constitution and laws of the state, and nothing more than a civil office of high dignity and trust, appear to my mind perfectly irresistible and conclusive. But I do not deem it necessary to go over them. I am willing to rest the question upon the argument contained in the opinion to which I have referred, and which is before the people of the state. The people are as capable of understanding the merits of the objection, that the office of governor is not a civil office under the constitution, and within the meaning of this statute, as professional men. I do not think that the word "office" is used either in the constitution or in this statute in a restricted sense; but in its most popular and general acceptance. *It applies to any place which imposes upon him who occupies it the performance of duties of a public nature.*

I anticipate an objection that will be made to this liberal construction of the statute. It will be said that the place of a member of the legislature is an office, while confessedly the court has no right under this statute, to try the claims of contestants to a seat in the legislature. Obviously not; and for the reason that the constitution expressly declares, sec. 7, art. 4, "that each house shall be the judge of the elections, returns and qualifications of its own members." It is a familiar rule of construction, that a general grant of power, or a general statute, may be controlled in a particular case, by a special grant. And this must be so, in order to give effect to the whole instrument, and render it consistent with itself. To my mind, this is a full and satisfactory answer to the whole question and objection. And here it seems to me we might safely stop. For if an argument could not be drawn from any source in favor of

the jurisdiction of this court over this proceeding, it might be rested on section 3, article 7 of the constitution, and chapter 126 of the revised statutes; and it would stand upon impregnable grounds. Concede that this court has original jurisdiction of the writ of *quo warranto* by the constitution—concede that chapter 126, under which this proceeding is had, is constitutional, and all the rest follows as irresistibly as the law of reason. There is no escape from it. But the argument in favor of the jurisdiction of this court is not exhausted. And let us look at this matter in another light.

Sec. 2, art. 7 of the constitution reads as follows: "The judicial power of this state, both as to matters of law and of equity, shall be vested in a supreme court, circuit courts, courts of probate and justices of the peace. The legislature may also vest such jurisdiction as shall be deemed necessary in municipal courts, and shall have power to establish inferior courts in the several counties, with limited civil and criminal jurisdiction providing," etc.

Here, it will be observed, by words the most apt, in language most clear, comprehensive and explicit, that the judicial power of the state is vested in certain courts. Of course, this grant of power is to be taken in connection with the exceptions elsewhere contained in the constitution. The senate is made the court for the trial of impeachments, sec. 1, art. 7. And there may be some other exceptions, though, none such occur to my mind at the present moment. But otherwise, this entire judicial power is vested in the courts, without limitation or restriction. Whether this was a wise grant of power is not now open for controversy. Were we framing a constitution with new powers, instead of administering one with clearly defined powers, then the inquiry would be pertinent; but it is not now. We then might inquire whether such an extensive grant of judicial power should be given to the courts of this state. But as the people have seen fit to delegate it to the state courts, they must exercise it when called upon or set in motion, or prove recreant to the duty imposed upon them by the constitution. I then ask, is the determination of rights of persons claiming to hold and exercise the office of governor of the state, the proper and legitimate exercise of judicial power? Is such a matter a proper subject for judicial inquiry and investigation? If not, why not? Is it because the controversy is about an office of high dignity and importance? But does the high character of the office render the right of him to hold it less valuable, or less an object of the protection of the law? Courts of justice inquire into and settle the conflicting claims of persons to the office of constable or justice of the peace, a sheriff of the county and other subordinate officers.

The rights of those officers are not considered beneath the protection of the court. And it would seem that the right to the

high office of governor ought not to be. This is the personal aspect of the question. How is it upon the ground of public policy? The public interests are most deeply involved in the matter. For there does seem to be a greater political necessity for some constitutional power of removing an intruder from an office of inconsiderable importance. In the latter case, the public welfare may not be so seriously endangered. The existence and tranquillity of the state may not be imperiled. But if a man can usurp the executive chair, and there be no power to remove him, constitutional government is at an end. There is no use in trying to disguise the matter. For if a man can usurp the chair of the executive department for a day, and cannot be reached, he can continue his power at will. We all know that the office of governor is one of grave responsibility. The proper discharge of its duties requires no common degree of talents, of sagacity and moral integrity. The dignity, the honor, the peace of the state are often committed to the prudence of the governor. He is to see that the laws of the state are to be faithfully executed. So it does not appear to me that, whether the controversy is regarded as involving a private right, which is, if possible, to be protected, or if it is regarded in a broader and more general aspect, as involving the interests of the state, a writ of *quo warranto* ought to lie to inquire by what warrant a person acted as governor.

The office was evidently regarded as one of great consideration by the framers of the constitution. Hence, we find that certain qualifications are necessary in order to entitle one to be eligible to it. He must be a citizen of the United States and a qualified elector of this state, see sec. 2, art. 5. But if the office is an inviolable one, and there is no power in the state competent to inquire into the right of a person to hold it, what is the value of these constitutional safeguards? Are they parchment guaranties without efficacy and without value? Suppose a person not possessing the qualifications, being neither a citizen of the United States, or an elector of this state, receives votes for the office of governor, claims to be elected, takes and subscribes the oath of office, gets possession of the records and papers belonging to it, is there no redress? Is there no power competent to inquire into his right to hold the office, and protect the constitution from invasion?

Take another case. Suppose the governor should be impeached before the court of impeachment, for corrupt conduct in office and for crimes and misdemeanors, and should be found guilty by the court. The constitution says that such a judgment shall not only be a disqualification forever after holding any office of honor, trust or profit, under the state, but shall be a sufficient cause of removal, the instant the judgment is rendered. That is the spirit if not the

exact letter of the provision. Still the person thus disqualified insists upon acting as governor. Is there no way that this right so to act can be inquired into and a judgment of ouster given? It may be said that these are improbable cases, or very extreme ones, But are they so improbable, or so remote as never to happen? And if they should happen where is the remedy? What power of the state can give relief? Are we remediless? Instances of this kind might be multiplied to any extent. I put them, because many of them were stated during the progress of the argument and they are cases, too, easily understood. And the question returns upon us, where is the protection of the people against them? Counsel seem to feel the necessity that there should be some remedy for them, and they significantly hinted where that remedy was to be found. It was to be found in a revolution. Ah! but that is not a constitutional remedy. It is one above the constitution. But we are now considering what means the constitution has provided for its own preservation. For if it has not those means, ample, adequate and equal to the political emergency of such, and other like cases, it is hardly worth spending any breath upon.

Again: section three, article five of the constitution reads as follows: "The governor and lieutenant governor shall be elected by the qualified electors of the state, at the times and places of choosing members of the legislature. The person respectively having the highest number of votes for governor and lieutenant governor shall be elected." A contest arises between two citizens of the state, who were candidates for the office, as to who received the highest number of votes; for whoever it may be, who has received the highest number of votes, unless constitutionally ineligible, must be governor. So the constitution declares. It cannot be said that this is an imaginary or improbable case. It has already happened, and in this popular government, it is quite as likely to happen again. Now, in what form is this to be settled? Where and by whom is it to be determined, as to who received the highest number of votes? By the legislative, by the executive or by the judicial department of the government? Perhaps it will be said that there is created by statute a competent tribunal to try and determine all such questions, to wit: the board of state canvassers. But can anyone point to a provision in chapter 6, R. S., and that is the only law we have upon the subject of canvassing votes for state officers, which by the remotest implication, in case of a contest for a state office, authorizes the board of state canvassers to make up an issue, impanel a jury, summon witnesses, take proof as to alleged frauds, errors or mistakes on the part of the town and county board of canvassers, and judicially determine who, under the constitution, is entitled to the office? No such provision can be found. The legislature never gave them any such power, and it does not apper-

tain to their office under the constitution. Whether it would have been competent for the legislature—under the constitution which delegates all the judicial power of the state to the courts of the state—to give to the board of state canvassers judicial authority to settle and adjudicate rights of this nature, it is not necessary to inquire. They have not given them any such power. Their duties are strictly ministerial.

They are to add up and ascertain, by calculation, the number of votes given for any office. They have no discretion to hear and take proof, as to frauds, even if morally certain that monstrous frauds have been perpetrated. The 95th section of this statute gives them no such power. And it is idle to look for it elsewhere, for they have not got it. So the question again recurs, what power of the government can give a speedy and adequate remedy? What power of this government is to settle this controversy? I think that the conclusion is irresistible, that it is the judicial power. If the contest cannot be settled in the courts of the state, it cannot be settled at all. And if redress cannot come from that source, it can only come in a violent manner by a revolution. And is this government thus powerless, impotent to correct an evil of this kind, impotent to shield its own high offices from usurpation? I cannot believe it. Ordinarily the courts have been found entirely adequate to settle and determine contests for office. It has been done in almost numberless cases in England. In the state of New York, under a constitution which distributes the powers of the government, and where there is a statute for canvassing the votes substantially like our constitution and our statute upon that subject, this power to determine the rights of persons to office has been repeatedly settled by the courts. The leading cases are *The People v. Clark*, 4 Cowen, 95; *The People v. Richardson*, 4 *id.* 57; *The People v. Ferguson*, 8 *id.* 102; *The People v. Vail*, 20 Wend. 12; *Ex parte Heath et al.* 3 Hill 42; *The People v. Seaman*, 5 Denio. 410; *Cook v. Welch*, 4 Selden; same case, 14 Bar. Sup. Ct. R., 259, and the recent unreported case of *Davis v. Cowles*. These offices were town, county and state offices. The court in Massachusetts have also had like suits before them, and I am not aware that in any of these cases, the jurisdiction of the courts were seriously questioned. This court has likewise adjudicated and settled the rights of contestants to office in two instances at this term. *State ex rel. Carpenter v. Ely*, and *State ex rel. Ege v. Rust, et al.* And one of the able counsel for the respondent (Mr. Arnold) admitted upon an argument in this cause, that the court could inquire into the right of a person holding any state office other than that of governor. And he failed, I think, to show that the same power might not also settle and determine the rights of persons claiming that office.

The objection to the exercise of the jurisdiction of this court

to entertain a proceeding to determine the right of a person to hold and enjoy the office of governor is, that it is dangerous to the independence of the executive department of the government. The executive power of the state is vested in the governor by the constitution, and hence it is said, you cannot interfere with the person acting as governor without disturbing that department. Who does not see the fallacy of this reasoning and the utter confusion of ideas in the very statement of the proposition? It assumes, in the first place, the very point in controversy, to wit: the right of the person acting as the governor, to the office. This inquiry proceeds upon the hypothesis, that this right is disputed, contested; that the respondent is an usurper. But whether he is or not is a question of fact to be established by proof alone. It is certainly very illogical to commence reasoning upon a proposition by begging the question. The question here is, who is entitled to hold the office of governor in this state? The answer given is, that the respondent is the governor, and there the argument ends. Concede it, and there is nothing to inquire into; no right to be ascertained, no subject for judicial investigation. But whether the respondent is the governor or not is the issue. But a still greater error in the reasoning upon this case consists in confounding the person who holds an office with the office itself. By the general theory and principle of our government, the legislative, executive and judicial departments are equal, co-ordinate and independent; each within the sphere of its powers. Admit it, and what follows? It is said that the person holding the office of governor is the executive department, or to state the proposition more intelligibly, the department and person are one and indivisible. Here is the vice of the most of the reasoning upon this subject. Gentlemen will not discriminate or do not discriminate between the office and the officer, a department of the government and a person exercising and acting in that department. Yet, to my mind, there is no difficulty whatever in making a distinction. I can easily conceive how an intruder may be removed from a department without interfering with, or disturbing or impairing one jot or tittle of the powers of such department. Were it not for the conceded ability of the gentlemen who have advanced this argument, vitiated by this palpable fallacy, involved in it, I should not deem it worthy a moment's examination. As it is, it must be treated with sufficient respect to explode, if possible, the absurdity. And I therefore say that there is not, and from the nature of the case there cannot be, any resemblance, any similitude, any necessary connection, much less identity, between a department of the government, and the person exercising the duties of the department. A department is a division or classification of a certain kind, of the powers of the government. It is not necessary to define what a person is, only negatively, and say that a person is not a department. Consider that the agents, the officers

of these departments have been successively changing since the adoption of the constitution. Yet the departments remain unchanged. Some have died perhaps, and others removed from the state; but the department whose duties they discharged are still unimpaired. So that this court can sit, examine and decide upon the rights of contestants to the office of governor, and give judgment against one, and for another, without breaking down or disturbing the executive department of the government.

Another conclusion more alarming, and more consequential than any yet noticed, is said to follow from the independence and co-equality of the departments of the government. It is the power of the person holding the office of governor to determine his own right to it. Whence does he derive this power? As observed by the chief justice, in the opinion delivered by him, you look in vain through the constitution and the laws for a provision giving him this power. If he has it at all, it is underived and inherent in his office. It is a high prerogative, not claimed by royalty itself, unless in the person of a despot. I shall be slow to believe that it belongs to any officer of this government.

Much has been said about what this court must take judicial notice of; as that it must judicially know that the board of state canvassers canvassed the votes cast at the last state election; determined upon such canvass that the respondent in this cause has received a majority of the votes; that they made the statement required by law, certified to it, and filed it in the office of the secretary of state, and that thereupon the secretary of state gave the respondent a certificate of election under the seal of the state, and that the respondent is the acting governor of the state; I suppose we do take judicial notice that the respondent is the acting governor in the same sense, and in no other, that we take judicial notice of who is the acting sheriff or circuit judge of this county. The right of persons to hold office cannot be inquired into collaterally. It can only be done by a direct proceeding of this nature. The determination of the board of state canvassers, and the certificate of election, we can only take notice of when it is set up in the proper plea before us. This has not been done, the counsel declining to plead them in bar to this proceeding. But this court cannot know, except by laborious, long continued and systematic inquiry, all about the votes cast at the last election—whether there were any frauds or mistake in the canvassing or return of votes that affected or destroyed the right of a person to an office. And I suppose this rule is one of general application. These observations might be extended, but I do not deem it necessary. I have given some of the reasons which have led me to the conclusion that, under our constitution and laws, this court has jurisdiction of this proceeding. That is really the great question in the case, and the only one of abiding interest which the court has been called upon

to decide. I desire that this point should stand boldly out upon the record of the case, and I shall not attempt to divert the public attention from that point to minor issues. I am prepared to take my share in the responsibility of this decision. This court has not sought this discussion, this apparent conflict with the other powers of the government. The questions have been presented here in the regular order, and we have decided no more nor no faster than the record compelled us to decide. And after the angry passions of this hour shall have become stilled, and the inconsiderate heat of party feeling subsided, when men's minds shall have become calmer, and reason again assert her supremacy over them, I cannot but believe that this decision will be generally approved by all the candid and thinking citizens of the country. But I take leave of this question and come to the motions yet undecided.

In the first place, I am clearly of the opinion that the attorney general cannot now dismiss this cause. If he could, I think all the objects of the statute of 1855 might be defeated. That statute gives any citizen claiming an office which has been usurped, the right to file an information in the nature of *quo warranto* upon his own relation, without the consent of the attorney general, and prosecute the same to final judgment; provided he shall first have presented the information to the attorney general, and he shall refuse to file the same. Now, as has been correctly said, this is an enabling statute, passed for the purpose of giving contestants a right to determine their respective claims to an office, when the attorney general is unwilling to move in the matter, making the relator responsible for the costs of the proceeding. And when the attorney general upon request as in this case, files an information substantially complying with this statute, and the cause progresses as this has done, I think the attorney general cannot defeat the relator's rights by dismissing the proceedings against the relator's consent. The case of entering a *nolle prosequi* upon an indictment is not analogous to the one before the court.

Now as to the motion for a judgment. Without doubt, judgment of ouster, can be given against the respondent, he having confessed all the allegations of the information to be true that are well pleaded. Such is the legal effect of this default. One of those allegations is, that he has usurped and intruded into the office of governor, and now holds it without any lawful authority. It cannot be necessary to go on and take proof and establish this allegation; if it is, a party would obtain a great advantage over his adversary by refusing to plead and to make up an issue; I believe the authorities generally say, that though in form, this is a criminal proceeding, yet that in character, it is a civil one; consequently the same effect is given to a default as in an ordinary civil action. This was the practice adopted in the recent contest upon the office of supreme

judge in the state of New York. Upon the default of Cowles, judgment of ouster was rendered against him.

But what is the effect of this default upon the rights of the relator? In the case just referred to—as I understand it—upon Cowles' making default, the court not only gave judgment of ouster against him, but a judgment establishing the right of Davies. And I am inclined to think that this is the general and perhaps correct practice. And in this case, I regret that it is so. I wish there was some way in which an issue could be made up and tried and the relator's rights to the office could be affirmatively established by the most competent testimony. But I know of none. I have thought that on account of the importance of this office, and the very great interest which seems to be felt throughout the state in reference to the cause, and after the action of the attorney general and the communication which he has made to the court, that we might require the relator to show at least a *prima facie* right to the office by exhibiting proofs before us. I do not say that it is necessary for him to do so in order to entitle him to a judgment upon the authorities. According to strict technical rules of practice, I believe that the relator is now entitled to judgment establishing his right; and though this is so, and notwithstanding the practice may be anomalous, yet for the reason above assigned, I do not think it an undue caution, an unreasonable exercise of the discretion of the court, if we have such discretion, to require of the relator some proof, which will show, *prima facie*, he has a right to the office, before we give a final judgment in his favor.

(In obedience to the order of the court, evidence was submitted showing the election of relator to the office of governor and judgment of ouster was given against the respondent *and induction for relator.*)

Opinion of SMITH, J., and WHITON, C. J., omitted.

This well known and leading case deserves careful study. The complete arguments of counsel will be found in the original report and are well worth reading. See also, *State v. Boyd*, 31 Neb. 682.

On the principle of the case above it has been held that the writ will lie against judges of the court of common pleas. *Commonwealth v. Dumbauld*, 97 Pa. St. 293. But a presidential elector has been declared not a state officer, and the writ refused against him. *State v. Bowen*, 8 S. Car. 400.

The writ will lie to test the title of state military as well as civil officers. *Commonwealth v. Small*, 26 Pa. St. 31; *State v. Brown*, 5 R. I. 1.

7. Induction of relator as part of the remedy.

IN RE STRONG, PETITIONER.

1838. SUPREME JUDICIAL COURT OF MASSACHUSETTS. 37 Mass.
484. *Supra*, page 158.

TILLINGHAST, J., in *State v. Lane*, 16 R. I. 620, 18 Atl. 1035—
“As to the claim made in the pleadings that relator was elected to the office of superintendent, we need only say that in this proceeding we can only pass upon the question of the defendant’s election, as *quo warranto* lies to remove the illegal incumbent of an office and not to put the legal officer in his place. Citing, *In re Strong*, Petitioner, 37 Mass. 484.

See also, *Bonner v. State*, 7 Ga. 473, 480; *People v. Londoner*, 13 Colo. 303; *State v. Meek*, 129 Mo. 431.

In many states, however, the remedy has been extended to determine the right of relator to the office and seat him if necessary. *Vrooman v. Michie*, 69 Mich. 42; *State v. Frantz*, 55 Neb. 167; *Palmer v. Foley*, 45 How. Pr. (N. Y.) 110; *State v. Heinmiller*, 38 Oh. St. 101; *State v. Pierce*, 35 Wis. 93, 101; *Davis v. State*, 75 Tex. 420, 426; *Henshaw*, *Ex parte*, 73 Cal. 486; *Brown v. Goben*, 122 Ind. 113; *State v. Commissioners*, 39 Kan. 85; *Manahan v. Watts*, 64 N. J. L. 465.

In Indiana, and perhaps also in Louisiana and Mississippi, if relator fails to establish his title, the proceeding fails.

Section 3.—Against Private Corporations and the Officers Thereof.

1. To correct usurpation of franchise.

PEOPLE v. THE RENSSELAER & SARATOGA RAILROAD COMPANY.

1836. SUPREME COURT OF JUDICATURE OF NEW YORK. 15 Wend.
114.

QUO WARRANTO.—The attorney general filed an information in the nature of *quo warranto*, against the Rensselaer & Saratoga R. R. Co., charging the company with claiming to be a body politic and corporate in law, fact and name, by the name of the Rensselaer & Saratoga R. R. Co., and with claiming the liberty, privilege and franchise of placing abutments, piers and other works in the bed, current and channel, of the Hudson River at Troy, in the county of Rensselaer, and of erecting and constructing a bridge upon such abutments, etc., over and across the river from the eastern to the western bank thereof; averring the river at the

place where the abutments were claimed to be placed and bridge to be built, to be an arm of the sea in which the tide ebbs and flows, navigable for sloops, schooners and other vessels, and to have been used and to be still used, by the citizens of this state and of the United States, in carrying on trade, commerce and intercourse, by means of such sloops, etc., under and in pursuance of the acts of congress of the United States, between ports and places on the Atlantic Ocean, and towns and villages on the banks of the river, situate above Troy, to-wit:—the villages of Lansingburgh and Waterford; concluding in the usual form, by praying process, etc.

The defendants pleaded that by an act of the legislature of this state, passed Apr. 14, 1882, they were created a body corporate and politic, in fact and in name, by the name of the Rensselaer & Saratoga Railroad Company, for the term of fifty years, for the purpose of constructing a single or double railroad or way from some proper point in the city of Troy in the county of Rensselaer, passing through the village of Waterford, in the county of Saratoga, to the village of Ballston Spa, in the latter county; and that by virtue of such act of the legislature, they are a body politic and corporate, in fact and in name, entitled to use the liberties, privileges and franchises granted to them, and for all the time mentioned in the information have used the same, and particularly the liberty, privilege and franchise, of constructing a single or double railway, from a proper point in the city of Troy in the county of Rensselaer, passing through the village of Waterford, in the county of Saratoga, to the village Ballston Spa, *and as a necessary part of such railroad or way, and not otherwise*, have used the liberty, privilege or franchise of *placing the abutments*, &c. and laying string pieces and other beams and timbers, upon such abutments, &c., and of building and constructing a bridge over and across the river, from the eastern bank thereof in the city of Troy, and on the direct route of such railroad, to the western bank of the river on Green Island, in the county of Albany, *leaving over the main or principal part of the channel an opening for a convenient and suitable draw, to enable vessels navigating the river to pass and repass*, and so as to restore the river to its former state, or in a sufficient manner not to have impaired its usefulness as a public navigable river and of upholding and maintaining such bridge &c. To which answer the attorney general put in a general demurrer and the defendant's joined.

By the court, SAVAGE, Ch. J. In support of the first objection taken on behalf of the people, it is argued that it is not enough for the defendants to aver in their plea that by virtue of the act of 1832, they are created and constituted a body corporate and politic in fact and in name; but that they should aver a compliance with the requirements of that act, and also with the general act relating to corporations, and show a performance affirmatively of those

acts, which were necessary to authorize them to organize and act as a corporation. The case of the *King v. Amery*, 2 T. R. 515, is cited as an authority on this point, but I am not able to perceive that the decision in that case turned upon that question. The information was filed against the defendant as an individual for exercising the office of alderman of the city of Chester. He pleaded a charter granted by Charles II, and that he was regularly elected alderman under that charter. The prosecutor took issue upon these facts; and also put in two special replications; 1. That the mayor, &c., were removed by the king by virtue of a power for that purpose reserved in the charter; and 2. That the attorney general filed an information against the corporation charging them with usurpation, and that such proceedings were had and that judgment *quosque* was entered by default, and that a subsequent charter was granted by James II, in October 1688, restoring the city of Chester to its ancient privileges, which was accepted by the mayor and citizens whereby the charter of Charles II became void. To the second replication the defendant rejoined, that judgment of seizure was rendered against the old corporation, in the reign of Charles II, whereby the old corporation was dissolved long before the charter by James II. Issue was joined and on the trial the jury found, among other things, the charter of Charles II, as in the defendant's plea, and that the defendant was duly elected by that charter; that the order of removal of James II was duly signified to the citizens and inhabitants, and that there was no final judgment upon the *quo warranto*. A motion was made to deliver the *postea* to the defendant, that he might enter judgment thereon. The argument in that case contains much learning, on the subject of proceedings against corporations; but it is not necessary to go at large into it. It was urged on the part of the prosecution that there are but two kinds of proceedings against a corporation: 1. When a corporation legally created abuses any of its franchises, or usurps others which do not belong to it, then the information should be against the corporation as such, and in such cases the judgment against it should be a judgment of seizure; but when a body of men assume to be a corporation, and the information is brought for usurpation, it cannot be brought against them by their corporate name, but as individuals; and in such case there must be a judgment of ouster. On the other hand, the opposite doctrine was maintained, and Ashurst, justice, in giving the opinion of the court, says that the information called upon the mayor and citizens to show by what authority they claimed to be a corporation; *non constat* by that information, that there was any corporation in Chester. The information imports the contrary, for it charges them with having usurped the name, privileges and authority of a corporation, without any legal right. He says that if any charter or prescription existed, it was incumbent for the defendants to have appeared and shown it; and by not doing

so they admitted that there was neither charter nor prescription to warrant such usurpation. This is the whole point of the decision in so far as it is applicable here; and all it proves is that the information is regular in proceeding against the defendants by their corporate name; but it does not prove that the defendants should do more in their plea than to claim title under their charter. It is not adjudged that the defendants should aver any acts of theirs under the charter to effect their incorporation.

The question as to the form of a plea in *quo warranto* does not appear to have been discussed in the cases in this court. In the *People v. Niagara Bank*, 6 Cowen, 196, and the two following cases, informations were filed against corporations; and the allegations were made that without any warrant, grant or charter, they used certain privileges, and franchises, towit, that of being a body politic and corporate in law, fact and name, etc. To this charge the defendants answer, that by a certain act of the legislature, (setting out the title of their act of incorporation), they were ordained, constituted and declared to be a body politic and corporate, in fact and in name; but they do not state the acts which were necessary to be done; such as the opening of books and subscriptions by stockholders; the subscription by commissioners; the apportionment of stock and the election of directors. No exception was taken to the plea on this ground, and therefore the approbation by the court of this general mode of pleading ought not, perhaps, to be considered, a positive authority in favor of it. Neither do the cases brought by corporations upon contracts prove much on this point. In the case of the *Bank of Auburn v. Aiken*, 18 Johns. R. 137, the defendants had pleaded *nul tiel* corporation, to which the plaintiffs replied that they were a corporation. The court said the replication was bad; the plaintiff should have shewn specially how they were a corporation. Of this case it may be said, that the decision founded on the authority of 1 Kidd, 284, does not give any precise rule farther than an intimation that there should have been an averment of the performance of those acts which were to be done before they could be a corporation. *Wood v. Jefferson County Bank*, 9 Cowen 194, such a replication was put into a plea of no corporation, and more was averred than was necessary. It was held that the corporation was not bound to prove the unnecessary averments. It was there intimated that upon the plea of the general issue it was necessary to prove that everything had been done which was necessary to be done before the incorporation became complete; but, subsequently in the *Utica Insurance Company v. Tillman*, 1 Wendell 555, *it was held that a corporation plaintiffs need only prove their charter and acts of user under it; and such is the rule now in this court.* If a corporation, when proceeded against is not bound to prove more than when they sue as plaintiffs, it would not now be necessary to prove more than is averred in the plea pleaded in this case; and from

the course of pleading adopted and approved of by the court, in the case of the People v. The Niagara Bank, and the other cases in 6 Cowen, it would seem that the plea is sufficient and that it is competent for the attorney general to reply any matter which should show a failure on the part of the corporation to comply with the requirements of the act creating them. On this point, however, it does not seem necessary to give any definite opinion, because the revised statutes seem to have regulated the proceedings in such cases, and to have adopted the suggestions of the counsel for the crown, in the case of the King v. Amery, as the correct mode of proceeding. Those statutes provide that an information in the nature of a *quo warranto* may be filed against individuals in several cases; one of which is, "When any association or number of persons shall act within this state, as a corporation without being legally incorporated." 2 R. S. 581, § 28, sub. 3. And a similar information may be filed against any corporate body, in several cases, when such corporation shall offend against their charter, or any act of the legislature affecting it; or shall have done or omitted any act which shall operate as a forfeiture by misuser, or nonuser, or a surrender; or when it shall exercise any franchise not conferred by law. 2 R. S. 583, § 39. By §§ 48 and 49, p. 585, the nature of the judgment to be rendered is different in the two different modes of proceeding. Whenever individuals or a corporation shall be found guilty, either of usurping or intruding into, any office or franchise, or of unlawfully holding, judgment of ouster shall be rendered, and a fine may be imposed; but where the proceeding is against a corporation, and a conviction ensues for misuser, nonuser or a surrender, judgment of ouster and a dissolution shall be rendered, which is equivalent to judgment of seizure at common law. *If, therefore, the information in this case had for its object, to oust the defendants from acting as a corporation, and to test the fact of their incorporation, it should have been filed against individuals; if the object was to effect the dissolution of a corporation, which had had an actual existence, or to oust the corporation of some franchise which it lawfully exercised, then the information is correctly filed against the corporation.* The distinction is well exemplified by Sir Robert Sawyer, in the King v. The City of London, cited in 2 T. R. 522. He says the rule is this: *when it clearly appears to the court that a liberty is usurped, by wrong, and upon no title, judgment only of ouster shall be entered. But when it appears that a liberty has been granted, but has been misused, judgment of seizure into the king's hands shall be given.* The reason is given; that which came from the king is returned there by seizure; but that which never came from him, but was usurped, shall be declared null and void. *Judgment of ouster is rendered against individuals, for unlawfully assuming to be a corporation. It is rendered against corporations for*

exercising a franchise not authorized by their charter. In such a case, the corporation is ousted of such franchise, but not of being a corporation. Judgment of seizure is given against a corporation for a forfeiture of its corporate privileges. The information in this case is therefore not the proper proceeding to call in question the corporate existence of the defendants; but in so far as it seeks to oust the defendants from the exercise of any franchise not granted to them, it is appropriate. When, therefore, an information is filed under the revised statutes against a corporation by its corporate name, the existence of the corporation is admitted; or rather, that it once had legal existence. This brings me to inquire whether the defendants have the right to build a bridge across the Hudson River at Troy, as a part of their railroad. * * *

(The court found that defendants were lawfully organized and possessed the rights claimed and gave judgment in their favor.)

Judgment for defendants on demurrer.

GREEN ET AL. V. PEOPLE EX REL. PAVEY, AUDITOR.

1894. SUPREME COURT OF ILLINOIS. 150 Ill. 513, 37 N. E. 842.

(INFORMATION in the nature of *quo warranto*. Judgment of ouster.)

SCHOLFIELD, J. The question here is whether, under the facts as presented by this record, "any associations or numbers of persons are acting within this state as a corporation without legally being incorporated." If they are, the judgment below is authorized by our statute entitled "*quo warranto*" (chapter 112, Rev. Stats., p. 787) and must be affirmed; otherwise it must be reversed.

We think it clear that in two respects at least these respondents are acting as a corporation (and it is not pretended that they are actually incorporated) namely: (1) In professedly limiting their liability to the amount of money contributed by each; (2) in assuming to give perpetuity to the business by making membership certificates transferable by the assignment of a member or his personal representatives. It may be, as contended by counsel, that individuals may insure property, against the loss by fire. They cannot limit their liability to any given amount of capital they choose to set apart for that purpose, nor can they perpetuate the business, without change of capital, beyond their own lives indefinitely. These things can only be done by a corporation. Ang. & A. Cor. (9th ed.) § 41; 2 Kent Comm. (8th ed.) 296, 268; Pars. Part. (2d. Am. ed.) 544; Gow, Part. (2d. Am. ed.) 17. The fact that these respondents may be legally held individually liable upon any policies they may

have issued does not relieve them of the charge of having acted as a corporation. They are, if individually liable, only liable because they have no statutory authority to do what they have assumed to do, because, instead of being a corporation, they have usurped the powers of a corporation. Were we to hold that these respondents can do without any legislative authority what they here assume to do, our insurance laws ought to be repealed; for individuals then, by organizing in this manner, could escape both individual and corporate liability beyond the amount of assets they might choose to place in the hands of their trustee as the basis of their liability. No public officer could investigate whether the amount is in fact paid in, how it is invested or how secured, and the public would thus have practically no protection, against dishonest companies. These respondents, if they will carry on the business of insurance, must either openly act upon their responsibility as individuals, or they must become incorporated, and subject themselves to the laws governing such corporations. The judgment is affirmed.

In this country few cases seem to have arisen wherein an information has been filed against individuals charging them with usurping the franchise of being a private corporation. Such informations in the case of public corporations have not been unusual, especially in England; but in this country, the ease with which a charter for a private corporation might be procured, both by way of special act, as well as under general statutes, has doubtless been the reason why so few cases may be found where a direct attempt has been made to usurp the primary franchise of being a corporation. With the extensive increase in the number of private corporations in this country, has also come a corresponding increase of cases wherein secondary franchises have been usurped or where under the cloak of its charter the company has been guilty of acts of misfeasance or malfeasance constituting a ground for forfeiture. The consequence has been an overwhelmingly large number of cases in *quo warranto* seeking judgment of ouster for the usurpation of such secondary franchise or forfeiture for abuse or misuse of charter privileges.

See *National Docks R. Co. v. Central R. Co.*, 32 N. J. Eq. 755; *People v. Clark*, 70 N. Y. 518; *State v. Pittsburgh, etc., R. Co.*, 50 Oh. St. 239; *People v. Erie R. Co.*, 36 How. Pr. (N. Y.) 129; *Reed v. Cumberland, etc., Co.*, 65 Me. 132; *State v. Hannibal, etc., Co.*, 37 Mo. App. 496; *People v. Trustees, etc.*, 5 Wend. (N. Y.) 211; *State v. Real Estate Bank*, 5 Ark. 595; *Albert v. State*, 65 Ind. 413; *State v. Pipher*, 28 Kan. 127; *People v. Stanford*, 77 Cal. 360, 372; *Smith v. State*, 140 Ind. 343; *State v. American Med. Col.*, 59 Mo. App. 264; *State v. Bull*, 16 Conn. 179, 190; *State v. Madison St. R. Co.*, 72 Wis. 612; *Parish of Bellport v. Tooker*, 29 Barb. (N. Y.) 256; *People v. Kingston, etc., Co.*, 23 Wend. (N. Y.) 193; *Ward v. Farwell*, 97 Ill. 593; *Attorney-General v. Perkins*, 73 Mich. 303; *State v. Uridil*, 37 Neb. 371.

PEOPLE EX REL. ATTORNEY GENERAL v. UTICA INSURANCE CO.

1818. SUPREME COURT OF NEW YORK. 15 Johnson 358.

(INFORMATION in the nature of *quo warranto* filed by the attorney general and charging that respondent company had usurped and was usurping and intruding into and using without warrant, charter or grant, "the following liberties, privileges and franchises, to-wit, that of becoming proprietors of a bank or fund for the purpose of issuing notes, receiving deposits, making discounts, and transacting other business which incorporated banks may and do transact by virtue of their respective acts of incorporation, and also that of actually issuing notes, receiving deposits, making discounts, and carrying on banking operations and other moneyed transactions which are usually performed by incorporated banks, and which they alone have a right to do, of all which liberties, privileges and franchises aforesaid, the said Utica Insurance Company, during all the time aforesaid, have usurped, and still do usurp upon the said people, to their great damage and prejudice; whereupon the said attorney of the said people prays advice of the said court in the premises, and due process of law against the said Utica Insurance Company, in this behalf to be made, to answer to the said people, by what warrant they claim to have, use and enjoy the liberties, privileges and franchises aforesaid." The insurance company filed its plea and answer justifying its user of the aforesaid franchises. Relator demurred.)

Harrison and T. A. Emmett, of counsel for respondent, maintained: 1. The acts charged against the defendants are not the exercise of franchises; and therefore an information in the nature of a writ of *quo warranto* will not lie against them. Franchise or not, is a question of law and is not admitted by the demurrer. A franchise is a royal privilege, or branch of the royal prerogative, subsisting in the hands of a subject, by grant from the crown. A writ of *quo warranto* is the king's writ of right, and issues where a franchise is usurped, or forfeited by misuser. (2 Bl. Com. 37; Finch's Law, 38, 164, 166; 3 Cruise's Digest, 278, tit. 27, sect. 1.) The word "franchises" is often used in common parlance, in a very broad sense, for all liberties; but its legal or technical signification is more confined. A franchise was, always, in England, a gem in the royal diadem. It was inherent in the crown from the first institution of monarchy. But the right of banking was never a franchise, or branch of the royal prerogative. The Bank of England was established in 1694, pursuant to an act of parliament (5 W. & M. cap. 20) which authorizes their majesties, William and Mary, to grant a commission to take subscriptions from individuals, and

to incorporate them. Had the power of banking been a royal franchise, this special authority from parliament would not have been necessary.

In 1697 (8 & 9 W. & M., ch. 20, s. 28) it was enacted that, during the continuance of the Bank of England, no other bank or any corporation, society, fellowship, company or institution, in the nature of a bank, should be erected or established, etc., by act of parliament. This still left individuals and ancient corporations free to bank. But in 1708 (7 Anne, ch. 7, s. 61) it was enacted, that during the continuance of the Bank of England, it should not be lawful for any corporation erected, or to be erected (other than the said bank), or for any other persons in partnership, exceeding the number of six persons, to take up money on their bills or notes, etc. It is clear then that if parliament had not interfered, all corporations might lawfully have carried on banking business; the act of 7 Anne restraining them, does not declare it unlawful, but merely prohibits the exercise of the power, while the Bank of England continued. It is manifest, therefore, that in England, banking was not considered as a royal franchise; and private banking is now carried on in that country, by associations of partnership of not more than six persons.

If we look to the acts of our legislature, we shall find that they speak the same doctrine. Numerous acts of incorporation have been passed since the restraining act of April 11, 1804, each of which contains a special clause to restrain the corporation from banking. (Here the counsel enumerated more than fifty acts passed since 1804, which he said contained a special restraining clause.) It is remarkable, also, that in the same session in which the restraining act was passed, there was an act of incorporation passed, containing a special prohibition against banking. What stronger evidence can be asked of the sense of the legislature, that the right of banking is not a franchise, but exists at large in every citizen, and may be freely exercised unless expressly restrained by the legislature?

The right was open to every individual and the defendants, being created a corporation, have as its inseparable incidents, a perpetual succession, a capacity to sue and be sued, a right to purchase and hold land, to have a common seal, and to make by laws, etc. (Kyd on Cor. 69, 70.) They might, therefore, as well as any individual, carry on banking business, unless expressly prohibited. If then, this is not a royal franchise, no information in the nature of a writ of *quo warranto* lies; for these informations have been substituted in place of that ancient prerogative writ. (2 Co. Inst. 496, 1 Bulst. 55, 56; Rex v. Marsden, 3 Burr. 1817, per Wilmut, J.) Not a case can be found in which a writ of *quo warranto* has been brought, or an information in the nature of one filed, for exercising the right of

banking. In the *King v. Shepherd* (4 Term. Rep. 381), Lord Kenyon said, that the old writ of *quo warranto* lay only where there was an usurpation on the rights and prerogatives of the crown; and that an information in the nature of a *quo warranto* could only be granted in such cases. So, in the case of the *King v. The Corporation of Bedford Level* (6 East. 359), Lawrence, J., says, "it has been always understood that a *quo warranto* only lay for encroachments on franchises created by the crown."

Again, for the exercise of any power incidental to a corporation, or an association, a writ of *quo warranto* does not lie. As well might it lie to ascertain by what authority individuals assembled for political purposes. A person entitled to a manor, need not show by what title he holds a court baron, for that is incident to a manor. (*Rex v. Stanton*, Cro. Jac. 259, 260.)

But it is said that the restraining act has made banking a franchise; and that no person can now exercise the right, without showing a legislative grant. Suppose, in England, after the restraining act, more than six persons had associated as bankers, would an information in the nature of *quo warranto*, have been filed against them? No; their acts would have been illegal and void. How have the legislature assumed this prerogative and franchise? How have they taken to themselves what was before the common right of every citizen? By prohibiting all unincorporated banking associations. Is everything which is made the subject of exclusive right or grant a franchise, and to be tried by a *quo warranto*? Ferries, running of stages, and steamboats are made exclusive rights; yet it has never been supposed that information in the nature of *quo warranto* would lie in the case of an invasion of these rights.

Again; the restraining act is not in the conjunctive; it declares that "no person unauthorized by law shall subscribe to, or become a member of, any association, institution or company, or proprietor of any bank or fund for the purpose of issuing notes, receiving deposits, making discounts, or transacting any other business which incorporated banks may, or do, transact, by virtue of their respective acts of incorporation." By this act the legislature assume the rights specified; they do not resume a franchise. If the legislature can thus assume all rights common to the citizens, there is no commercial business whatever that they cannot prohibit; and so the chamber of commerce apprehended. And on their petition, the sections to the act, 27 sess., ch. 110, s. 8 & 9, were passed in explanation of the restraining act. It was, in effect, an act to restrain commercial partnerships or companies; but the explanatory sections do virtually repeal the restraining act.

It may be said that banking is *quasi* a franchise or branch of prerogative. But when every individual has a right to bank, how can it be in any degree or shape a franchise? The act merely re-

strains associations. Every citizen or inhabitant may, if he pleases, be a banker. Can it be possible that the legislature may assume to itself the rights of every citizen? Such is not the law of England. If it is the law of any country, it is the law of Turkey, where, alone, it can be imagined that the common rights of man should be doled out for the purposes of gain. The mind revolts at the idea of a legislature bargaining out the common rights of the citizen for money. If the exercise of the right be injurious, prohibit it. What is granted should be given freely. A contrary doctrine would be attended with the most pernicious effects. * * *

Van Buren in reply. * * * The general demurrer admits that the power exercised by the defendants is a franchise; and it follows that this is the proper remedy. But is it not a franchise? The chancellor had no doubt on the question. He says that "the right of banking was, formerly a common law right belonging to individuals, and to be exercised at their pleasure. But the legislature thought proper, by the restraining act of 1804, which has since been re-enacted, to take away the right from all persons not specially authorized by law. Banking has now become a franchise derived from the grant of the legislature, and subsisting in those only who can produce the grant; if exercised by other persons, it is the usurpation of a privilege for which a competent remedy can be had by the public prosecutor in the Supreme Court." This ought perhaps to be a sufficient authority on this question. But to pursue it further: A franchise is a liberty or privilege. There is a distinction between royal and common franchises; between those of the sovereign and those of the people, as the right of trial by jury. When the colony became a sovereign and independent state, the people succeeded to all the rights and privileges of the English subjects, and more; they succeeded to all the rights and privileges of the crown or sovereign. The legislature have, accordingly, from time to time, granted various exclusive liberties and privileges, or franchises, to citizens. By the restraining act of the 11th of April, 1804, the legislature did take to itself the right or liberty of banking. What was before common to all, ceased to be so, and became a franchise or privilege in the government, not to be exercised by citizens, unless by grant. Whether this was a franchise in England or not, it is made a franchise here; and the legislature were competent to make it so. It is true, that private individuals may bank; but the defendants are an association carrying on banking business, in violation of the act of April 11, 1804, passed expressly to prevent any unauthorized or unincorporated association from banking. Being a privilege then, which the defendants could not lawfully exercise, without a grant from the legislature, it comes within the very definition which has been given of a franchise. We could not proceed by indictment, for the act gives a penalty, and

not to the people but to the informer. If this remedy does not lie, there is no remedy, civil or criminal. It is, at least, a liberty, in the nature of a franchise; and this is the only and proper remedy. * *

(Opinion of THOMPSON, Ch. J., omitted.)

SPENCER, J. Two questions have been brought forward in the argument:—

1st. Whether an information in the nature of *quo warranto* will lie in this case.

2nd. Whether the defendants have authority under the act incorporating the Utica Insurance Company, to carry on banking operations in the manner set forth in their plea.

(Only so much of the opinion as relates to the first question and the meaning of the term franchise, is here given.)

The statute (1 N. R. L. 108) gives this writ against any person who shall usurp, intrude into, or unlawfully hold and execute, any office or franchise, within this state; and if the right set up by the defendants is a franchise, and the act under which they claim to exercise it does not confer it, then the defendants are subject to this prosecution.

A franchise is a species of incorporated hereditament; it is defined by Finch (164) to be a royal privilege or branch of the king's prerogative subsisting in the hands of a subject; and he says that franchises being derived from the crown, they must arise from the king's grant, or, in some cases, may be held by prescription, which presupposes a grant; that the kinds are various and most infinite, and *they may be vested in natural persons or bodies politic*.

All the elementary writers agree in adopting Finch's definition of a franchise, *that it is a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject*.

An information, in the nature of a writ of *quo warranto*, is a substitute for an ancient writ, which has fallen into disuse; and the information which has superseded the old writ, is defined to be a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise, as to oust him, and seize it for the crown. It has, for a long time, been applied to the mere purpose of trying the civil right, seizing the franchise, or ousting the wrongful possessor, the fine being merely nominal. (2 Inst. 281, p. 112; 3 Burr. 1817; 4 Term. Rep. 381; 1 Bulst. 55.)

If there are certain immunities and privileges in which the public have an interest, as contradistinguished from private rights, and which cannot be exercised without authority derived from the sovereign power, it would seem to me that such immunities and privileges must be franchises; and the act for rendering the proceedings upon writs of mandamus, and informations in the nature of a *quo warranto*, more speedy and effectual, presupposes that they

are franchises, other than offices, which may be usurped and intruded into. If, in England, a privilege in the hands of a subject, which the king alone can grant, would be a franchise with us, a privilege or an immunity of a public nature, which cannot legally be exercised without legislative grant, would be a franchise. The act commonly called the restraining law (sess. 27, ch. 114) enacts, that no person, unauthorized by law, shall subscribe to, or become a member of any association, or proprietor of any bank, or fund, for the purpose of issuing notes, receiving deposits, making discounts, or transacting any other business which incorporated banks do, or may transact, by virtue of their respective acts of incorporation.

Taking it for granted for present, for the purpose of considering whether the remedy adopted is appropriate, that the defendants have exercised the right of banking, without authority, and against the provisions of the restraining act, they have usurped a right which the legislature have enacted should only be exercised and enjoyed by authority derived from them. The right of banking, since the restraining act, is a privilege or immunity subsisting in the hands of citizens, by grant of the legislature. The exercise of the right of banking, then, with us, is the assertion of a grant from the legislature to exercise that privilege, and consequently it is the usurpation of a franchise, unless it can be shown that it is a privilege granted by the legislature. *An information in the nature of a writ of quo warranto, need not show a title in the people to have the particular franchise exercised, but calls on the intruder to show by what authority he claims it; and if the title set up be incomplete, the people are entitled to judgment.* (2 Kyd on Cor. 399; 4 Burr. 2146-7.)

This position is illustrated by the nature and form of the information; the title of the king is never set forth; but after stating the franchise usurped, the defendant is called upon to show his warrant for exercising it.

This consideration answers the argument urged by the defendant's counsel, that banking was not a royal franchise in England, and that it is not a franchise here which the people in their political capacity can enjoy; for if their title to enjoy it need not be set out in the information, it is not necessary that it should exist in them at all. In the case of the *King v. Nicholson et al.* (1 Str. 303), it appeared that by a private act of parliament for enlarging and regulating the port of Whitehaven, several persons were appointed trustees, and a power was given to them to elect others upon vacancies by death or otherwise. The defendants took upon them to act as trustees without such an election; and upon motion for an information in the nature of a *quo warranto* against them, it was objected by the counsel for the defendants, that the court never grants these

informations but in cases where there is an usurpation upon some franchise of the crown; whereas, in that case, the king alone could not grant such powers as are exercised by the trustees, the consequence of which was, that this authority was no prior franchise of the crown. To this it was answered, and resolved by the court, that the rule was laid down too general, for that informations have been constantly granted when any new jurisdiction or public trust was exercised without authority; and leave to file an information was, accordingly granted. This case is strong authority in favor of this proceeding.

Many cases might be cited, in which informations, in the nature of *quo warranto*, have been refused, where the right exercised was one of a private nature, to the injury only of some individual. In the present case, the rights claimed by the defendants is in the nature of a public trust; they claim as a corporation, the right of issuing notes, discounting notes, and receiving deposits. The notes they issue, if their claim be well founded, are not obligatory on the individuals who compose the direction, or are proprietors of the stock of the corporation. These notes pass currently, on the ground that the corporation have authority to issue them, and that they are obligatory on all their funds; the right claimed is one, therefore, of a public nature, and as I conceive deeply interesting to the community; and if the defendants cannot exercise these rights, without a grant from the legislature; if they do exercise them as though they had a grant, they are, in my judgment, usurping an authority and privilege of a public kind; and we perceive that it is not necessary that the right assumed should be a prior franchise of the crown, or of the people of the state.

Had the defendants claimed and exercised the right of banking as private individuals, I agree that an information would not lie against them; they would have been subject only to the penalties inflicted by the act; but they claim the privilege as a corporation, and under a grant from the legislature. If they have not that grant, they have usurped and exercised a franchise, and the remedy pursued is well adapted to the case. * * *

Judgment of ouster.

See also *People v. Mayor, etc.*, 32 Barb. (N. Y.) 35; *Reynolds v. Baldwin*, 1 La. Ann. 162; *People v. Golden Rule*, 114 Ill. 34; *State v. Norwalk, etc., Co.*, 10 Conn. 157; *State v. Lindell R. Co.*, 151 Mo. 162; *State v. Commercial, etc., Bank*, 24 Miss. 144; *State v. Atchison, etc., R. Co.*, 38 Neb. 437; *State v. Regents, etc.*, 55 Kans. 389.

As to what is a "franchise" within the meaning of the statutes of *quo warranto*, see also *State v. Ramos*, 10 La. Ann. 420; *West's Appeal*, 64 Pa. St. 186; *Whelchel v. State*, 76 Ga. 644; *People v. Anderson, etc., R. Co.*, 76 Cal. 190; *Douglass's Appeal*, 112 Pa. St. 65; *Swarth v. People*, 109 Ill. 621. *Contra*:—*State v. City of Topeka*, 30 Kan. 653.

See also *State v. Green*, 112 Ind. 462.

2. To test the constitutionality of the act of incorporation.

ATTORNEY GENERAL V. PERKINS ET AL.

1889. SUPREME COURT OF MICHIGAN. 73 Mich. 303, 41 N. W. 426.

(QUO WARRANTO against the respondents to try the right to renew a mining corporation, whose term had expired. Plea that said renewal was by virtue of the statute providing for such renewal. Replication set up the unconstitutionality of said statute. Demurrer.)

(Only so much of the opinion as relates to the right to attack the constitutionality of an act by *quo warranto* is here given.)

CHAMPLIN, J. * * * Before proceeding to consider the merits of the case involved by the points of law raised by the pleadings, it is well to dispose of an objection taken to the remedy invoked by the attorney general. It is asserted by the respondents that the constitutionality of an act of the legislature cannot be raised in a proceeding upon an information in the nature of *quo warranto*, when the respondents justify under such act. The idea seems to be that the people are estopped from questioning the validity of a law enacted by their representatives; that to an accusation by the people of Michigan of usurpation upon their government, a statute enacted by the people of Michigan is an adequate answer. The last proposition is true, but if the statute relied on in justification is unconstitutional, it is a statute only in form, and lacks the force of law, and is of no more saving effect to justify action under it than if it had never been enacted. The constitution is the supreme law, and to its behests the courts, the legislature and the people must bow. No corporation in this state can exist unless it be created by law, and every corporation when called upon by the people to show by what authority it exercises the franchises and privileges of a corporation, must show a valid enactment of the legislature for its authority. The legislature and the respondents are not the only parties in interest upon such constitutional questions. As was remarked by Justice Story in speaking of an acquiescence by a party affected by an unconstitutional act of the legislature: "The people have a deep and vested interest in maintaining all the constitutional limitations upon the exercise of legislative powers." *Allen v. McKeen*, 1 Sum. 314. The constitutionality of enactments passed by the legislature has been called in question in many cases in this state by information in the nature of *quo warranto* filed by the attorney general. *People v. Maynard*, 15 Mich. 463; *Attorney General v. Amos*, 60 Mich. 372; 27 N. W. 571; *People v. Railroad Co.*, 9 Mich. 285; *Attorney Gen. v. Holihan*, 29 Mich. 116. The cases cited in support of the position taken by respondents cannot prevail against the practice so firmly

established in this state. The case of the People v. Whitcomb, 55 Ill. 172, is at variance with that of Attorney General v. Holihan, above cited. Besides this proceeding was not instituted to test the constitutionality of an act of the legislature, but to try the rights of certain persons to exercise the franchises and privileges of a corporation, and is expressly authorized by the statute. How. St., § 8635. In the case of People v. R. R. Co., 15 Wend. 113, it was not claimed that the statute conflicted with any constitutional provision of the state of New York, but it was claimed that it violated the constitution of the United States. The court held that it did not. It was therefore a valid law and a sufficient answer to a charge of usurpation. * * *

(Court found that the statute in question was unconstitutional and directed judgment of ouster.)

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3. For perversion and non-user of corporate powers and privileges and failure to comply with charter conditions.

COMMONWEALTH v. THE COMMERCIAL BANK OF PENNSYLVANIA.

1857. SUPREME COURT OF PENNSYLVANIA. 28 Pa. St. 383.

(THIS was a motion to quash a writ of *quo warranto* issued out of the supreme court, on information of the attorney general, to procure a forfeiture of respondent's franchises because of its having dealt in promissory notes, contrary to the express prohibition in its charter, and because of having taken a higher rate of interest for loans than the rates prescribed in said charter.)

(Only so much of the opinion as relates to acts constituting good ground for forfeiture, is here given.)

The opinion of the court was delivered by

LEWIS, C. J.—A writ of *quo warranto* having issued against the Commercial Bank, upon a suggestion filed by the attorney general, alleging that the bank had forfeited its charter by certain acts of misuser, the present motion was made to quash the writ. A number of reasons have been assigned in support of the motion, but they may be resolved into two. One goes to the formal defects in the manner of setting forth the complaint; the other to the merits and raises the question, whether the acts complained of are sufficient to entitle the commonwealth to demand a forfeiture of the charter. *

(The court after affirming the right to amend an information and examining the right to deal in bills of exchange—which it held was

permitted by the charter—and the acceptance of usurious interest, continues),

* * * There is nothing therefore, in the mere purchase of these bills as stated in the suggestion proposed to be filed as an amendment, which we can declare to be contrary to the charter of the bank. The right to make loans by discounting promissory notes at the rate prescribed is plainly deducible from the terms and objects of the act of incorporation; but the right otherwise to deal in promissory notes, or to make loans at a higher rate than that prescribed, does not exist. These acts are expressly prohibited in the fundamental articles. The question then arises, do these constant and wilful violations of the fundamental conditions upon which the charter was granted entitle the commonwealth to demand its forfeiture? *The question is not whether a single act or series of acts of misuser, through inadvertence or mistake, may work a forfeiture, but whether the constant and wilful violation of these important conditions of the grant produce that effect?* Mr. Justice Story, in delivering the opinion of the Supreme Court of the United States in *Mumma v. Potomac Company*, held, that “a corporation by the very terms and nature of its political existence, is subject to dissolution by forfeiture of its franchises for wilful misuser or non-user.” 8 Peters’ Reports 287. Many years before that decision was pronounced, the same principle was fully recognized by the same high authority in *Truett et al. v. Taylor et al.*, 9 Cranch 43, where the right of forfeiture for misuser or non-user was held to be “the common law of the land and a tacit condition annexed to the creation of every corporation.” It is now settled by numerous authorities, that it is a tacit condition of a grant of incorporation that the grantees shall act up to the end or design for which they are incorporated; and hence, through neglect or abuse of its franchises, a corporation may forfeit its charter, as for condition broken, or for a breach of trust; see Angell & Ames on Corporations, p. 660, and the cases there cited. In the *Attorney General v. Petersburg and Roanoke Railroad Company*, 6 Iredell 461, it was held that the omission of an express duty prescribed by charter is a cause of forfeiture, and that as implied powers are as much protected by law as those which are expressed, implied duties are equally obligatory with duties expressed, and their breach is visited with the same consequences. 6 Iredell 461. *It may be affirmed as a general principle, that where there has been a misuser, or a non-user, in regard to matters which are of the essence of the contract between the corporation and the state, and the acts or omissions complained of have been repeated and wilful, they constitute a just ground of forfeiture.*

* * *

* * * The charter fixes the rate of interest on loans and expressly prohibits the taking of a higher rate. It also, as we have

seen, prohibits the bank from dealing in promissory notes. We have no doubt that a violation of the charter, in either of these particulars, defeats the chief object of the grant, and is good ground for demanding judgment of forfeiture. These abuses are of such magnitude and effect the public so injuriously, that, when wilfully persisted in, it becomes a duty of high obligation on the part of those in authority, rigidly to enforce the forfeiture.

These are the views at present entertained. We have been obliged to express them in order to dispose of this motion. But the question, whether the acts complained of amount to a forfeiture of the charter, will be open to further investigation on the final decision of the case.

The motion to quash the writ of *quo warranto* is overruled.

PEOPLE EX REL. BISHOP V. KINGSTON & MIDDLETON.
TURNPIKE ROAD COMPANY.

1840. SUPREME COURT OF JUDICATURE OF NEW YORK. 23 Wend.
194.

INFORMATION in the nature of a *quo warranto*. In January Term, 1839, the attorney general filed an information in the nature of a *quo warranto*, against the Kingston & Middleton Turnpike Road Company, charging them with usurping the liberties, privileges and franchises of being a body politic and corporate, by the name of the Kingston and Middleton Turnpike Road Company, and by that name to construct and maintain a turnpike road within certain bounds (specifying the same), and to erect and maintain gates and turnpikes upon such road, and to levy and collect tolls from all persons using the same. All which liberties and privileges he charged to have been usurped. * * *

(Defendants pleaded their incorporation by an act of the legislature and their erection and maintenance of a turnpike from Kingston to Delaware County; also subsequent acts extending the time for the completion of the turnpike. To this plea the attorney general filed thirty replications setting forth as many distinct failures to comply with the charter provisions.)

By the court, NELSON, C. J. It is contended that the matters set forth in the several replications of the attorney general, are not causes of forfeiture of the corporate privileges of the defendants, and that therefore the replications are no answers to the plea. The first 24 contain matters which, if true, show a failure to perform six separate and distinct conditions annexed to the grant, specifying

particularly the nature of each. The remaining replications will be noticed hereafter. The question for the present will be, whether this breach or neglect to comply with any or all the requirements of the charter, shall work a forfeiture either by statute, or at common law.

The statute, 2 R. S. 483, § 39, provides for the filing of an information against a corporate body, whenever it shall, 1. Offend against any of the provisions of the act or acts, creating, altering or renewing such corporation; or 2. Violate the provisions of any law by which such corporation shall have forfeited its charter by misuser; or 3. Whenever it shall have forfeited its privileges and franchises by non-user; or 4. Whenever it shall have done, or omitted any acts which amount to a surrender of its corporate rights, privileges and franchises; or 5. Whenever it shall exercise any privilege or franchise not conferred upon it by law.

It has been strongly urged for the defendants, that the two first clauses, though apparently declaratory of two separate grounds of forfeiture, should be read together; and that the offenses against the provisions of the act, creating the corporation, as specified in the first, the same, as the violation of any of the provisions of the law, as specified in the second, must be such as will work a forfeiture by misuser in terms, in order to justify the filing of the information. This is supposed by the defendants' counsel to have been the substance of the act of 1825, session laws, p. 450, § 7, from which these provisions were taken. But on a reference to that act, it will be found otherwise; the two separate grounds are as distinctly marked there as here. The seventh section provides, that in case the president, directors and company of any corporation, shall at any time offend against any of the provisions of the act or acts of incorporation, or against the provisions of any law by which such company shall have forfeited its charter by misuser, etc., it shall be the duty of the attorney general, to prosecute, etc., and obtain judgment that such corporation be dissolved. Both statutes obviously intended that corporations should fulfil the conditions and perform the duties enjoined by the fundamental law of their creation, as the terms upon which to enjoy their privileges. The principle is not new; it has always been so held at common law as fundamental. Lord Holt said, in *London City v. Vanacre*, 1 Ld. Raym. 498, "all franchises which are granted, are upon condition, that they shall be duly executed, according to the charter that settles their constitution; and that being a condition annexed to the grant, the citizens cannot make an alteration; but if they neglect to perform the terms of the patent, it may be replaced by *scire facias*." The principle is so thoroughly and firmly fixed in the law of corporate bodies, that I need do no more than refer to some of the authorities. A non-performance therefore, of the conditions of the act of incorporation,

is deemed *per se* a misuser, that will forfeit the grant even at common law; and hence if the reading of the statute claimed, be conceded, it would not change the legal effect. 12 Mod. 271. Cruise, tit. Franchise, § 79; J. in Heane v. Rodgers, 9 Barn. & Cress. 577; being pleaded, however, Wilcocks on Cor., p. 334. Angell & Ames on Cor. 510, and cases there cited.

But granting this to be the general principle, the question still comes up for consideration, what departure from the provisions of the charter will work a forfeiture? Shall every omission or non-performance of a condition of the grant have this effect? Though the proceeding by information be against the corporate body, it is the acts or omissions of the individual corporators, that are the subject of the judgment of the court. The powers and privileges are conferred, and the conditions enjoined upon them; they obtain the grant and engage to perform the conditions; and when charged with a breach, I do not perceive any reason against holding them accountable upon principles applicable to an individual to whom valuable grants have been made upon conditions precedent or subsequent. As to him, performance is indispensable to the vesting or continued enjoyment. If a feoffment be made of lands upon condition of paying rent, building a house, or planting an orchard, and a failure to perform, the feoffer may enter. So if an office be granted, a condition is implied that the party shall faithfully execute it, and for neglect the grantor may discharge him. 1 Bacon 629; 15 Wend. 291; 1 *id.* 388, 13 *id.* 530.

Placing corporate grants upon this footing, there can be no great difficulty in ascertaining the principles that should govern conditions annexed to them. The analogous cases of individual conditional grants will give the rule. In these a reasonable and substantial performance according to the intent of the grantor is required. Shep. Touch. 133; 15 Wend. 291. In cases of conditions subsequent, if impossible to be performed, or rendered impossible by the act of God, the grantee is excused, and the estate is absolute. 2 Bacon 676, tit. Condition; Shep. Touch. 133, 157. So if waste be committed by a stranger, it shall not be a breach of the condition of the lease. 2 Bacon 652. The whole law on the subject will be found reasonable; and nothing is required but what is within the means and ability of the party to comply with. It is emphatically so with respect to corporators, for we all know the conditions in their charters and the nature of them depend very much upon themselves; they usually settle the terms of the grant, and therein consult their own as well as the public interest. The acceptance also is voluntary, and must be unconditional. Wilcocks on Cor. 31, and cases there cited. This view of the case of conditions subsequent in acts of incorporation, is confirmed by the settled doctrine with respect to those which are precedent. There, as in the case of individual grants, the condition

must be first performed before the franchise vests. 18 Johns. R. 137; 9 Cowen 194; 9 Wend. 378-9; 15 *id.* 127; Angell & Ames 379. Even where the corporation undertakes to enforce a contested claim or title, in a court of justice, performance of a condition precedent, if any exists, must be either admitted or proved; because being essential to its existence, the proof must be given before a suit can be maintained in the corporate name.

Now I am not aware of any ground that can warrant us in distinguishing between the materiality or the legal effect of conditions precedent and subsequent; or that would exact the performance of the one as a condition of corporate being, and not of the other; the same authority prescribed both, and we are to presume for good and wise ends. Neither has the statute authorizing the filing of informations against corporations made any such distinction, as has already been seen. 2 R. S. 483, § 39. We could not, therefore make one, were we so disposed.

One strong ground for regarding the conditions in these grants in the same light as in the case of private individuals is, that they are mainly obtained with a view to private interests. I admit the public interests are often thereby promoted; and that this is the chief inducement to the grant on the part of the legislature. But most of them are sought for, from considerations of private gain, and which more or less enter into the grant of every private company. In this respect they differ from public corporations, which are but the investment of a body of citizens with municipal authority for the better government of a place. The corporators have no private interest in the matter. The former are but individuals stipulating for and accepting the grant upon certain terms for their own benefit. *The acceptance implies an undertaking to perform them; and to neglect or refuse is a fraud upon the legislature.*

In further illustration of the sort of neglect of duties, which are imposed by the grant of a franchise, or, in other words, the misuser that will work a forfeiture, we may refer to the class of cases that arise out of the forfeiture of offices. These cases are not all strictly analogous, because the duties enjoined are not so definite and accurately prescribed as in cases of corporations; but they will serve as illustrations. It is laid down as a general principle that if an officer acts contrary to the nature and duty of his office, or refuses to act at all, he forfeits it; and, if granted by patent, he may be turned out by *scire facias*. 5 Bacon, 210, 212, tit. Offices and Officers; 9 Coke, 50, 98. For in every grant of office, there is an implied condition that the grantee will diligently and faithfully execute the duties of it. Lord Coke says, in the Earl of Shrewsbury's case, 9 Coke 50, that there are three causes of forfeiture: 1. Abuser; 2. Non-user; and 3. Refusal. The first is, where the sheriff or gaoler permits a voluntary escape, or abuses the privileges, etc.; or a for-

ester or parker cuts wood, unless for necessary brush. The second, where the officer is concerned in the administration of justice, or of the commonwealth and neglects to attend upon his duties; and the third, where he is bound to attend upon request, and refuses; in either case the office is forfeited. Sickness is an excuse; but in the case of a searcher of a port, voluntary absence when search should be made, is not. Cro. Car. 491. And Lord Holt held that the voluntary absence of a recorder of Ipswich, he holding a public office, was cause of forfeiture, though no inconvenience ensues. 2 Ld. Raym. 1237. Mr. Hawkins doubts this, but adds, that he who so far neglects a public office as plainly to appear to take no care of it, should rather be immediately displaced than the public be in danger of suffering damage. 1 Hawk. 311, b. 1, ch. 67, § 1. Lord Mansfield in *Rex v. Wells corporation*, 4 Burr. 2004, said that a general neglect, or refusal to attend the duties of a public office, is a reason of forfeiture, a determined neglect or wilful refusal, but a single instance of omitting to attend, when no particular business was expected, nor in fact happened, is a very different case. It is said that one negligent escape by the sheriff is not a cause for forfeiture; but that one voluntary escape is; so of two or more negligent escapes. 5 Bacon 210; 4 Burr. 2007. Thus it will be seen that the franchise of an office held upon an implied condition of diligently and faithfully executing the duties belonging to it, may be forfeited by general neglect, or wilful refusal to perform. *The ingredient of a bad or corrupt motive need not enter into the cause, it is enough if the duty is neglected or designedly omitted.*

The hardship of exacting from corporations a fulfillment of all the conditions of the charter, has been urged upon us; but the appeal is made to the wrong forum. That is a question to be settled with the legislature that prescribed them. It is not for the courts to say one condition is material, and must be performed on pain of forfeiture; and another is unimportant and may be dispensed with, or enforced by indictment or pecuniary penalty. Where shall we draw the line? The statute makes no such distinction; if corporations offend against "*any of the provision or provisions of the act or acts creating*" them, the information may be filed and judgment of ouster rendered. 2 R. S. 483, § 39; *id.* 485, § 49. Besides, the hardship is no greater than in the case of individual grants, where in a court of law nothing short of performance or act of God, or of the grantor, will excuse the forfeiture. While this rule is steadily enforced against them, I do not perceive how we can deny its application to the case of a private association of individuals. If the condition is onerous, and unessential to the purposes of the charter, relief is plain, and at hand; the legislature will repeal it. While it remains on the statute books we are to presume it was deemed material by those who had a right to judge of the matter, and should be enforced. I speak now of express conditions; where they are im-

plied, and of course undefined, except by construction of law, a more indulgent consideration may well be given. We are not then tied to the letter of the statute. Their materiality to the great end of the institution may be regarded, and enter into the judgment of the court.

The remedy by repeal being thus plain and easy, I am unable to appreciate the force of the appeal on the ground of hardship, even if properly made to us. I desire to treat these institutions with all reasonable indulgence, consistent with the express injunctions of the law. Under proper regulations, they are often eminently useful instruments in the hands of citizens to promote valuable and meritorious enterprises, public and private; and at an early day, and even at this time, none more so than those institutions to construct our public thoroughfares, or less gainful to the corporators. But their usefulness as well as public favor depend upon an honest and faithful fulfillment of the duties they have assumed. It is the neglect of these, the failure to live up to the fundamental law of their being, that has mainly contributed to the doubt as to the wisdom of their creation, and the disfavor with which they are now regarded by many. Their own as well as the public interests will be best consulted by holding them to a strict accountability. The terms and conditions of their grant being settled and accepted, they ought not be allowed to act beyond its scope and end, nor come short of it. Within this line of duty, their acts should be liberally expounded, and indulgently regarded both by the courts and the public.

For the above reasons I am of the opinion that the true construction of the statute authorizing proceedings against corporations by information, imposes the penalty of forfeiture on failure to perform any express condition annexed in the act of incorporation; that it is a misuser within the meaning of the 49th section, and would be so regarded even at common law, as a fundamental rule in respect to corporate bodies; and applying this principle to the issue upon the first twenty-four replications, it follows that the people are entitled to judgment, unless concluded by the license of the governor. * *

(The court held that the license of the governor was not conclusive and could not be pleaded and rendered judgment for the relator. Dissenting opinion of COWEN, J., is omitted.)

See also *People v. North River, etc., Co.*, 121 N. Y. 582; *People v. Chicago, etc., Co.*, 130 Ill. 268; *Distilling, etc., Co. v. People*, 156 Ill. 448; *Chrystal Ice, etc., Co. v. State*, 23 Tex. Civ. App. 293; *State v. Buckeye, etc., Co.*, 61 Oh. St. 520; *State v. Standard Oil Co.*, 49 Oh. St. 137; *State v. Nebraska, etc., Co.*, 29 Neb. 700, holding *quo warranto* to be the proper remedy to protect the state against monopolies and combinations of corporations having for their object the restraint of trade.

STATE EX REL. ATTORNEY GENERAL V. MINNESOTA
THRESHER MANUFACTURING COMPANY.

1889. SUPREME COURT OF MINNESOTA. 40 Minn. 213, 41 N. W.
1020.

(INFORMATION in the nature of *quo warranto* alleging that respondent company was doing business without having first filed its certificate of incorporation, that it had unlawfully dealt in negotiable paper, that it had unlawfully purchased and retired its own stock, and that it had used its charter for a cloak for fraud and oppression.)

(Only so much of the opinion as relates to the distinction between "franchises" and "powers" is here given.)

MITCHELL, J. * * * While it is not necessary here to go at length into the subject, yet it is proper in this connection to consider briefly the second principal question referred to at the outset, viz., the office of an information in the nature of *quo warranto*, and what will amount to such a misuser of corporate franchises as to justify a judgment of forfeiture in such proceedings. And right here it is important to keep in mind certain distinctions which it seems to us the counsel for the relator have overlooked. And, first, these special proceedings upon information must not be confounded with a civil action, under Ch. 79, Gen. Stat. Although, in a general sense the two may be termed "concurrent remedies" yet it is undoubtedly true that the office or function of the latter has been enlarged somewhat beyond that of a common law *quo warranto* information. In some jurisdictions, as formerly with us, the civil action is the only remedy. But while, *quo warranto* having been revived in this state, we have now the two remedies, yet the office of the writ of *quo warranto* ought not to be extended beyond what it was at common law. The remedy by civil action is more in accordance with the ordinary mode of judicial procedure, in determining property rights and ought to be pursued except in those exceptional or special cases where the public interests seem to demand a more speedy or summary mode of procedure than by action in the district court. The common law *quo warranto* information, as we have it today, is substantially as left by the changes and modifications made by the statute of 9 Anne, Ch. 20. The scope of the remedy furnished by it is to forfeit the franchises of a corporation for misuser or nonuser. It is therefore necessary in order to secure a judicial forfeiture of respondent's charter to show a misuser of its franchises justifying such a forfeiture; and as already remarked, the object being to protect the public, and not to redress private grievances, the misuser must be such as to work or threaten a substantial injury to the public, or such as to amount to a violation of the fundamental condition of

the contract by which the franchise was granted, and thus defeat the purpose of the grant; and ordinarily the wrong or evil must be one remediable in no other form of judicial proceeding.

Courts always proceed with great caution in decreeing a forfeiture of franchises, and require the prosecutor seeking the forfeiture to bring the case clearly within the rules of law entitling him to exact so severe a penalty. It is also necessary to notice the distinction, frequently overlooked, between "*franchises*" and "*powers*." The definition of a franchise given by Finch, adopted by Blackstone and accepted by every authority since, is "a royal privilege or branch of the king's prerogative, subsisting in the hands of a subject." To be a franchise the right possessed must be such as cannot be exercised without the express permission of the sovereign power,—a privilege or immunity of a public nature which cannot be legally exercised without legislative grant. It follows that the right, whether existing in a natural or artificial person, to carry on any particular business, is not necessarily or usually a franchise. The kinds of business which corporations organized under either title 2, Ch. 34, or under the act of 1873, are *powers* but not franchises, because it is a right possessed by all citizens who choose to engage in it without any legislative grant. The only franchise which such corporations possess is the general franchise to be or exist as a corporate entity. Hence, if they engage in any business not authorized by the statute, it is *ultra vires*, or in excess of their powers, but not an usurpation of a franchise not granted, nor necessarily a misuser of those granted. Acts in excess of power may undoubtedly be carried so far as to amount to a misuser of the franchise to be a corporation and a ground for its forfeiture. How far it must go to amount to this the courts have wisely never attempted to define, except in very general terms, preferring the safer course of adopting the gradual process of judicial inclusion and exclusion as the cases arise. *But we think that it may be safely stated as the general consensus of the authorities that, to constitute a misuser of the corporate franchise, such as to warrant its forfeiture the ultra vires acts must be so substantial and continued as to amount to a clear violation of the condition upon which the franchise was granted, and so derange or destroy the business of the corporation that it no longer fulfills the ends for which it was created.* But, in case of the excess of powers, it is only where some public mischief is done or threatened that the state, by the attorney general should interfere. If, as between the company and its stockholders, there is a wrongful application of the capital, or an illegal incurring of liabilities, it is for the stockholders to complain. If the company is entering into contracts *ultra vires*, to the prejudice of persons outside the corporation, such as creditors, it is for such persons to take steps to protect their interests. The mere fact that acts are *ultra vires* is not necessarily, a ground

for interference by the state, especially by *quo warranto*, to forfeit the corporate franchises. It should also be born in mind that acts *ultra vires* may justify interference on the part of the state by injunction to prohibit a continuance of the excess of powers which would not be a sufficient ground for a forfeiture in proceedings in *quo warranto*, and hence many of the numerous authorities cited by the relator, being of that class, are not entirely in point here. Applying these principles to the facts of this case, we think the state has failed to make out a case entitling it to judgment against the respondents. Taking up, first, the issuing of its stock for the stock and indebtedness of the car company: None of the stockholders have any right to complain of this. They are all in the same boat. They got up the company for that express purpose and on that exact plan. A corporation may take property in payment of its stock, if it be done *bona fide*, and with no sinister or fraudulent purpose, and there be nothing in its charter or the nature of its business that forbids it. If this stock and indebtedness of the car company was taken in payment of respondent's stock, with a fraudulent purpose, at fictitious values, in case the corporation becomes insolvent, creditors have their remedy against the stockholders, as personally liable for stock not paid for. The alleged unlawful purchase and retirement of part of its own stock by the respondent stands on the same footing. If it is a wrong to other stockholders, they have a perfect remedy; and, so far as creditors are concerned, if the act is illegal, the parties who surrendered the stock would still be personally responsible as stockholders in case of the insolvency of the corporation. It may be that the plan on which this corporation is organized is not in accordance with the most approved financial principles, but with these financial matters we have nothing to do, except so far as they may affect the legal questions involved; and, upon the whole facts of the case, we do not think that, under the rules of law applicable, the state has made out a case entitling it to a judgment of forfeiture in these proceedings. It is also a consideration not without weight (although we do not place our decision upon it) that the consequences of whatever mistakes or unauthorized acts may have been done or made by respondent could not now be remedied by any such judgment. In view of the present condition of respondent's business, a dissolution of the corporation and a forced winding up of its affairs, would involve new and additional loss to all parties concerned, both stockholders and creditors. The demurrer to the answer is therefore overruled, and the information dismissed.

Quo warranto does not lie to correct *ultra vires* acts of a corporation. *State v. Hannibal, etc., Co.*, 37 Mo. App. 496. But such *ultra vires* acts may be treated as usurpations of powers and an action of *quo warranto* seeking ouster—and in some cases even forfeiture—maintained.

STATE v. RAILWAY COMPANY.

1884. SUPREME COURT COMMISSION OF OHIO. 40 O. St. 504.

* * * IN August, 1876, an information in the nature of a *quo warranto* was filed in the district court of Mahoning County, against the Hazelton and Leetonia Railway Company, asking that it be ousted of its franchise to be a corporation and of all its franchises as such. To this information special demurrers were filed and sustained by the court. In accordance with leave granted by the court an amended information was filed May 15, 1877, which contained three counts. To each of these counts, pleas were filed. The issues were made up by replication on the part of the relators. The controlling questions, as made by the pleadings were two:—

1. Did the Hazelton & Leetonia Railway Company misuse the powers, franchises and privileges conferred upon it?

2. Did it non-use its powers, franchises and privileges for a period of five years before the filing of the original information?

The district court found in favor of the railway company, and the case is in this court upon a petition in error.

NASH, J.—The only question which we can determine in this case is, as to whether the judgment of the district court was manifestly against the weight of the evidence. After an examination of all the testimony, we cannot concur in the finding of the district court. To our minds there had been, for five years prior to the commencement of this proceeding, not only, a non-user of the powers, franchises and privileges conferred upon this corporation, but there had also been a palpable misuse of them.

Under its charter this railway company had the right to construct and operate a railway, as a common carrier and for the benefit of the public, from the town of Hazelton to the village of Leetonia. It assumed the performance of duties for the benefit of the public generally. It wholly failed, prior to the filing of the original information to take any steps looking toward the accomplishment of this purpose. It condemned a right of way and constructed a track about two and one half miles in length, three feet two inches wide, with heavy grades and sharp curves, to coal mines owned and operated by the principal corporators and stockholders of the railway company, and suitable only for the transfer of the coal from these mines to Hazelton, where there are other railroads. No passenger cars were put upon the road, no depots or freight houses were constructed, and nothing done to secure or accommodate public traffic or travel. Judging by the things done by the corporation, its sole object was to furnish a means of transferring the products of the private mines, owned and operated by the principal incorporators and stockholders, to a place where they could be carried to market.

Judgment reversed and cause remanded.

4. To oust foreign corporations from doing business within the state.

STATE EX REL. ATTORNEY GENERAL v. FIDELITY &
CASUALTY INSURANCE COMPANY.

1888. SUPREME COURT OF MINNESOTA. 39 Minn. 538; 41 N. W.
108.

DICKINSON, J.—This is a proceeding upon information in the nature of *quo warranto* to try the right in the above named respondent, a corporation of the state of New York, to carry on within this state the business of insurance against these three classes of risks, viz., injury or death of persons caused by accident, breach of trust by persons holding places of public or private trust, and the breakage of plate glass. The case is presented for decision upon the relator's demurrer to the answer of the respondent. It is contended on the part of the respondent that this is not an appropriate method of procedure. We hold the contrary. A state has the power of a sovereign to prohibit foreign corporations from exercising their franchises, carrying on their ordinary corporate business, within its borders; and when, in defiance of such prohibition, and contrary to our law, a foreign corporation does assume to exercise corporate franchises in a manner affecting the public interests, *quo warranto* will lie for the purposes of determining the right in question, and of applying a remedy, although it is true that the courts of a state have no power to affect by their judgments the corporate existence of foreign corporations. We can restrain the exercise within our own jurisdictions, of corporate franchises inconsistent with our own sovereignty, whether the corporation whose acts are in question be domestic or foreign. *State v. Railroad Company*, 25 Vt. 433. And see *People v. College*, 5 Wend. 211. It is said on the part of the respondent, that we ought not to entertain the proceeding because the determination of the question whether it should be licensed and admitted to transact its business in this state is committed by law to a branch of the executive department of the state, and that the judicial department of the state has no constitutional control over the action of the executive department. In this the counsel for respondent fail to distinguish between the authority of the judicial department to control the action of executive officers, and the power and duty of the courts to determine, in causes before them, the rights of parties although the legal propriety and effect of the action of executive state officers may thus necessarily be brought into question. We have assumed without so deciding, that the insurance commissioner, in respect to the discharge of his duties, is exempt from judicial control.

The insurance commissioner, in granting certificates or licenses

to foreign corporations to do business here, acts in a ministerial capacity. His determination and action are not judicial and final. If our statute, to be hereinafter recited, prohibits foreign corporations, under certain circumstances, to do business in this state, the authority or license of the commissioner in disregard of that statute would be unavailing. * * *

(The court after examining the matter of "retaliatory laws" as affecting foreign corporations and finding that the effect of the Minnesota statute would not be to exclude respondent from transacting the business of insurance in Minnesota, ordered the writ to be quashed.)

See also *State v. Fidelity, etc., Co.*, 77 Iowa, 648; *State v. W. U. M. Life Ins. Co.*, 47 Oh. St. 167; *State v. Mutual, etc., Ins. Co.*, 59 Kan. 772; *State v. Portage City, etc., Co.*, 107 Wis. 441, 451; *State v. Standard Oil Co.*, 61 Neb. 28; *State v. Vigilant Ins. Co.*, 30 Kan. 585.

The fact that a corporation is engaged in interstate commerce does not emancipate it from the control of the state which created it, and *quo warranto* will lie to forfeit its franchises and dissolve it. *State v. Cincinnati, etc., R. Co.*, 47 Ohio St. 130, 7 L. R. A. 319.

5. Discretion in granting or refusing the writ.

PEOPLE EX REL. MACY ET AL. v. HILLSDALE & CHATHAM
TURNPIKE COMPANY.

1807. SUPREME COURT OF NEW YORK. 2 Johnson 190.

WOODWORTH, ATTORNEY GENERAL, moved for a rule, that the defendants show cause, by the next term, why an information, in the nature of a *quo warranto*, should not be filed against them. He read affidavits, stating, that the road had been opened, through the land of the complainants, and used without any offer having been made to them to agree upon the compensation, and without having the damages ascertained according to law.

Per curiam.—If the defendants have not followed the directions of the act, relative to the compensation to be made to the owners of the land, through which the road has been made, they are trespassers, and the complainants have adequate remedy in the usual course of the common law. The public are no way interested in the controversy or complaint, and that is a sufficient reason for not granting this extraordinary remedy.

Rule refused.

STATE EX REL. O'BRIEN v. THE KILL BUCK TURNPIKE CO.

1871. SUPREME COURT OF INDIANA. 38 Ind. 71.

WORDEN, C. J.—This was an information filed under the provisions of Article 44, 2 G. & H. 322, by the appellant against the appellee. Demurrer to the information sustained, and final judgment for the defendant. Exception.

The information alleges that the defendant is a corporation, organized under the act of May 12, 1852, authorizing the construction of plank, etc. roads. 1 G. & H. 474. It further alleges that the corporation has wrongfully and unlawfully exercised powers not conferred by law, in this, that it has entered upon the land of three several persons, naming the persons and describing the land, and cut timber, dug up soil, gravel, etc., and constructed its road upon said lands without any authority or license from the respective owners of the land, and to their great damage.

For aught that appears in the information, the defendant may have proceeded to condemn the lands, and may have paid the condemnation money as provided for in the act under which it is organized. But supposing no proceedings have been had to condemn the lands, or acquire the right to construct the road over them, we are of the opinion that the facts stated in the information are not sufficient to work a forfeiture of the defendant's corporate franchises.

The statute provides that an information may be filed, "Fourth, where any corporation do or omit to do acts which amount to a surrender or forfeiture of their rights and privileges as a corporation, or when they exercise powers not conferred by law."

It is claimed by the appellant that this case comes within the last branch of the above clause, inasmuch as the defendant has no right to construct its road, across anyone's land without his consent and without having in some manner acquired the right of way.

The defendant had a right to construct a road, and to collect tolls thereon, and, for that purpose, to acquire the right of way either by agreement or condemnation; and if it proceeded to construct its road across lands without having acquired the right of way in any manner, it was a trespasser but did not thereby exercise powers not conferred by law, within the meaning of the statute above quoted. We are not aware that it has been held in any case that a mere trespass by a corporation is sufficient to work a forfeiture of its franchises. We think that the provision in the statute above quoted, in reference to the exercise of powers not conferred by law, was intended to meet cases where corporations undertake to exercise corporate powers or franchises not conferred

upon them, as for example, where an insurance company exercises the powers of a banking company, or where a corporation of any description usurps and exercises corporate powers of a different character from those provided for in the law of its organization.

If the corporation has entered upon the lands of those persons named in the information, and located its road thereon without leave, not having acquired the right of way, those persons have ample legal remedies by suits in their own names, but they cannot adjust their private rights in a proceeding of this kind. The case is almost, if not entirely, identical with that of the People v. The Hillsdale & Chatham Turnpike Co., 2 Johns. 190.

(The court stated the facts and quoted the opinion in the case cited, *supra*.)

The judgment below is affirmed.

Where it appears that the acts of misuser have resulted in no injury to the public nor are likely to, the court will ordinarily refuse to decree a forfeiture. So forfeiture was refused in *Harris v. Mississippi, etc., R. Co.*, 51 Miss. 602, where there was a slight deviation from the charter route; *State v. Commercial Bank*, 13 Sm. & M. (Miss.) 569, where a bank had made an assignment; *People v. Kankakee River, etc., Co.*, 103 Ill. 491, where there was a failure to file a statement of the Company's condition, the object of the statute having ceased; *Commonwealth v. Pittsburgh, etc., R. Co.* 58 Pa. St. 26, incorporating in another state; *People v. Atlantic Ave. R. Co.*, 125 N. Y. 513, for failing to run trains for five days and requiring more than statutory number of hours of labor from employees; *State v. Barron*, 58 N. H. 370, for failure to file statements required by statute; *State v. Essex Bank*, 8 Vt. 489, withdrawing a portion of Bank's capital stock to reduce amount of capital; *State v. Commercial Bank*, 10 Oh. 535, for suspension of bank taking usurious interest, and disproportionate loans to officers; *Attorney-General v. Erie, etc., R. Co.*, 55 Mich. 15, for failure to run its trains to a certain village and for deviation from charter route.

But in the following cases forfeiture was declared: *State v. Farmers, etc., Asso.*, 18 Neb. 276, failure to comply with statutory requirements; *People v. City Bank*, 7 Colo. 226, failure to pay up entire capital; *State v. Bailey*, 16 Ind. 46, filing fraudulent articles; *People v. Dispensary, etc., Soc.*, 7 Lans. (N. Y.) 304, dividing state appropriation with lobbyists; *State v. R. R. Co.*, 36 Minn. 246, suspension of business for four years; *State v. Madison St. R. Co.*, 72 Wis. 612, failure to keep road in condition required by charter; *State v. Pennsylvania, etc., Co.*, 23 Ohio St. 121, failure to keep canal repaired; *Bank Com'rs v. Bank, etc.*, 6 Paige (N. Y.) 497, illegally loaning money to directors; *Commonwealth v. Commercial Bank*, 28 Pa. St. 383, taking usurious interest; *State v. Milwaukee, etc., R. Co.*, 45 Wis. 579, 590, keeping company's books and principal place of business outside state; *People v. Improvement Co.*, 103 Ill. 491, failure to make improvements required by charter; *State v. Cincinnati, etc., R. Co.*, 47 Oh. St. 130, discrimination in rates; *State v. Atchison, etc., R. Co.*, 24 Neb. 143, leasing entire railroad line.

6. To correct usurpation of corporate office.

a. *American rule.*COMMONWEALTH EX REL. CLEMENTS ET AL. V. ARRISON
ET AL.

1826. SUPREME COURT OF PENNSYLVANIA. 15 Serg. & R. 127.

A RULE was granted by the court in this case, against Matthew Arrison and others, the defendants, to show cause why an information in the nature of *quo warranto*, should not be filed against them for exercising the office of "Trustees of the Ninth Presbyterian Church in Philadelphia." The defendants now objected in the first instance, that the office they exercised was not the subject of an information of this description.

Argument for the defendants. The ancient *quo warranto* issued where a franchise of the crown was usurped by an individual, and the king alone could proceed against the usurper. A franchise is defined to be a royal privilege in the hands of a subject. 2 Bl. Com. 37; Finch 164, 166; 2 Inst. 493, 496; 1 Bulst. 55. The extent of an information in nature of a *quo warranto*, is exactly the same as the ancient writ; it is not granted except in cases where the writ lay. *Commonwealth v. Murray*, 11 Sergt. and Rawle, 73, 74; 15 Johns. 387. The sole object of the writ was, to resume the franchise which had been usurped; therefore, all the cases on this subject, collected by Comyns in his Digest, are of usurpation on the crown by exercising a public office. 6 Com. Dig. 157; 2 Johns. Ch. 377. It has therefore, been decided, that an information of this kind did not lie in case of private rights, where no franchise of the crown has been invaded. It will not lie for erecting a warren. *Rex v. Sir William Lowther*, 1 Str. 637. Nor for forfeiture of the place of recorder, by non-attendance. Lord Bruce's case, 2 Str. 891. Nor for claiming an exclusive right of ferry. *Rex v. Reynell*, 2 Str. 1161. Nor in the case of church wardens, *Rex v. Dawbeny*, 2 Str. 1196; which may be considered a case strictly analogous to the present, and has been again decided in England since. See 15 Johns. 369. Such information lies not for holding court-leet, and the reason given is, that it is a private right, which may be tried in a civil action. *Rex v. Cann, Andrews* 14. It will not lie for opening a road without compensation. 2 Johns. 190. The statute of Anne gave this remedy to private persons and that statute does not extend to Pennsylvania. Stat. 9 Ann. c. 20; 3 Bl. Com. 264; 2 Kyd on Cor. 424.

In the present case, there has been no usurpation of a franchise, against the state. The state has granted the franchise by charter, under the act of 1791, and the only question is which of the parties

may exercise this franchise of being trustee of the corporation. Many of our corporations under the act of the sixth of April 1791, (3 Sm. Laws 20), are private corporations, and are so regarded both by our legislature and at common law; and in the exercise of a sound discretion even if the court have the power they would only grant this writ in the cases of officers which are usurped against the commonwealth or the public are interested. 2 Ld. Raym. 1409, Case Temp. Hard. 347, 1 W. Bl., are all cases in which the informations have been refused on this ground, or granted on the ground that the offices were of public concern. Informations are not matters of course, but are discretionary. 3 Bac. Ab. 644; Hawk P. C. Book 2, ch. 26, § 9; People v. Richardson, 4 Cowen 102. What power have these trustees, who are objects of the present dispute? They have the care of the church property, and are limited to temporalities; but the property is not in them, the public is in no way concerned; they could not even support an ejectment. Let those pew holders who think the defendants improperly elected, pay their rent to the relators. There are probably not less than a thousand private corporations in Pennsylvania, and their disputes will drive all other business out of court; or else these disputes as to annual offices can not be decided within the year, and, therefore, relief can not be given. The court is not committed by former decisions; the point is still open. The cases in Pennsylvania have passed *sub silentio*; several of them relate to offices of a public kind; such as county treasurer, inspector of prisons, county commissioners, and collectors of taxes. In Com. v. Murray, 11 Serg. & Rawle 73, the court evince a strong remedy against this remedy in cases like the present.

Argument for the relators. A *quo warranto* lies wherever a franchise is usurped against the king's prerogative. 2 Inst. 282; 9 Co. 28 a; Yelv. 191; Finch 164; 3 Bl. Com. 262. Now a franchise is defined to be a royal privilege in the hands of a subject. Finch 164; 3 Bl. Com. 262, and a privilege of exercising a corporate trust comes within this principle. Accordingly, the court has exercised the power now asked for; they did so in the case of the German Lutheran Church, Com. v. Woelper, *et al.*, 3 Serg. & Rawle, 29, where judgment of ouster was rendered upon an information against persons exercising the office of churchwardens and vestrymen, after a trial; and a fine of six shillings and eight pence was imposed, without costs. *Ib.* 52. In Com. v. Cain *et al.*, 5 Serg. & Rawle 510, an information against the defendants as vestrymen of a church, was refused, on the merits, and there was no question made about the propriety of granting the information, if it had been a proper case for it. In the case of the Com. v. Murray, 11 Serg. & Rawle 73, the court for the first time, express doubts concerning the remedy by information; but that was the case of a minister, and it was refused on a ground that was decisive against the relators there, namely, that they did not claim under the charter by which

the defendant claimed. There are many previous instances of the application of this remedy by our Supreme Court; such as against the treasurer of Cumberland county, in 1799, where it was said by Shippen, J., to be the first application of the kind, Com. v. Wray, 3 Dall. 490; against the defendant for exercising the office of recorder of Philadelphia, which was refused on the merits, Com. v. Dallas, 4 Dall. 229; against the inspector of the prison of Philadelphia, Com. v. Douglass, 1 Binn. 77; and again, the case of the information granted against a collector of taxes, an office of a subordinate grade and a limited sphere, Com. v. Browne, 1 Serg. & Rawle 382. In Com. v. Union Ins. Co. of Newberyport, 5 Mass. 230, Chief Justice Parsons says:—*Informations of this kind are properly grantable for the purpose of inquiring into the election or admission of an officer, or member of a corporation, when moved by any person interested in, or injured by such election or admission.* 3 Mass. 385, recognizes the same principle. In England, this mode of proceeding has not been confined to the limits supposed. In Rex v. Nicholson, 1 Str. 299, an information was granted against persons who acted as trustees under an act of parliament for enlarging and regulating the port of Whitehaven; and it is said, that an information is always granted, where a new jurisdiction or public trust is executed without authority; and various cases are given in Kyd on Corp. 395, 417, 418, 419, 421.

In the present case, there is no adequate remedy, but by information, many acts may be done by officers *de facto*, if suffered to continue, which cannot be avoided. The money received by them from the pews cannot be recovered back by an action. The public is greatly concerned in these corporations; they are numerous and large, and valuable interests of every description are involved in them. Suppose individuals illegally chosen take possession of the funds of a bank, the mischief they may do is immense, if there be no summary remedy for their removal. This court will not be deterred by the inconvenience of taking this jurisdiction, arising from multiplicity of business and the difficulty of the question, since great good results from the exercise of this power. We have not had altogether a dozen cases of informations of this kind in fifty years. No distinction can be drawn between public and private corporations; or rather, all are public, since they are emanations from the supreme power of the community, and are all established and regulated by a public law.

The opinion of the court was delivered by,

TILGHMAN, C. J.—A rule was laid on the defendants, to show cause why an information in the nature of a writ of *quo warranto*, should not be filed against them, for exercising the office of "Trustees of the Ninth Presbyterian Church in Philadelphia."

Before entering into the merits of the case, the counsel for the defendants made a preliminary point, viz.: that the office exercised

by the defendants was a mere private matter, in which the public had no concern, and therefore not the subject of an information. This point was fully and well argued, and the court has been furnished with all the learning to be found in the books on the subject. The statute of 9 Anne, Ch. 20, not having been extended to Pennsylvania, the court must derive its power from the common law. Bull, N. P. 211. That, however, is of little importance, as the better opinion is, that the statute gave no new jurisdiction, but was made for the purpose of regulating informations, and making the remedy more effectual, easy, cheap, and expeditious, in cases of persons acting as corporation officers. An information is said to be grantable only where the ancient writ of *quo warranto* would lie, and that writ, according to the argument of the defendants, was confined to cases where there was a usurpation of the king's prerogative, or one of his franchises, or a misuser or nonuser of some right or privilege granted by the crown. A franchise is a word of extensive significance; it is defined by Finch, whom all subsequent writers have followed, to be "*a royal privilege in the hands of a subject.*" Finch, 164. Franchises are divers, says Finch, and almost infinite; of such sort are the liberty of holding a court of one's own; the right of warren in another's land; the right of holding markets, fairs, and taking toll, etc.

The commonwealth stands in the place of the king, and has succeeded to all the franchises and prerogatives proper for a republican government, and those only; for many branches of the royal prerogative would be altogether improper in this country. Informations have been granted in England in almost all cases where the public were interested in some of which it would be difficult to show, that any prerogative or franchise of the king had been invaded. As in the case of the mayor and common council of Hartford, who took upon them to make strangers free of the corporation, without being qualified according to the charter. The reason assigned by Buller for granting this information was, "because the injured freemen of the town had no other way of remedying themselves, or of trying the right." To be free of a corporation, was certainly no royal franchise; but perhaps in a very large sense, it might be said that the king's prerogative was invaded, when his charter was violated, by admitting one as a freeman, contrary to its provisions. If that principle be correct, it will have an important bearing on the case before the court. An information was granted against certain persons, for acting as trustees under an act of parliament for enlarging and regulating the port of Whitehaven, 1 Str. 299.

The granting permission to file informations of this kind, on the application of private persons, is a matter of discretion, and the court will refuse it in cases of little import, or where the injury is of a private nature. It was refused in *Sir William Lowther's*

case, (2 Ld. Raym. 1409, 2 Kyd on Corporations, 418), "for setting up a free warren," on the ground that it was of a private nature, and therefore proper to be prosecuted only in the name of the attorney general, if the king should think fit. So, in the King v. Hansell (9 Geo. II cas. temp. Hardw. 247), Lord Hardwicke thus expresses himself:—"The court, indeed, have themselves made this distinction, to grant informations for public usurpations; but it is only of a private franchise, not concerning the public government, as a fair, etc., the court has sometimes refused them, and directed an application to the attorney general." It is observable, that Lord Hardwicke does not here deny the right of the court to grant the information, but affirms it. Whether to grant or refuse it, in case of a church warden, has been a vexed question in England, but has been finally settled against granting it. I find no instance of an information in the nature of a *quo warranto* in that country, except in case of the usurpation of the king's prerogative, or of one of his franchises, or where the public or a considerable number of people are interested. Neither do I find any case where it has been denied, that the court may, in its discretion, grant it, where an office is exercised in a corporation, contrary to the charter. In England, the number of corporations is very small indeed, compared with the United States of America; consequently the quantity of that kind of business which may be brought into our courts will be much greater than theirs; but that alone is not a sufficient reason for rejecting it.

We are now to decide a general question on the right of the court; not on the expediency of exercising that right, either in the present or any other case. Now, to establish it as a principle, that no information can be granted in cases of what the counsel call private corporations, might lead to very serious consequences. Perhaps it may be said that banks, and turnpike, canal and bridge companies, are of a public nature; but yet they have no concern with the government of the country or the administration of justice. They are no farther public, than as they have to do with the great numbers of persons. But if numbers alone is the criterion, it will often be difficult to distinguish public from private corporations. Let us consider churches for example; in some, the congregation is very numerous, in others very small; how is the court to make the line of distinction? If you say that the court has the right in both cases, to grant or deny the information, according to its opinion of its expediency, there is no difficulty as to the right; but if it be alleged that there is a right in one case, and not the other, the difficulty will be extreme. *I strongly incline to the opinion, that in all cases where a charter exists, and the question arises concerning the exercise of an office claimed under that charter, the court may, in its discretion, grant leave to file an information; because in all such cases, although it cannot be strictly said that any prerogative*

or franchise of the commonwealth has been usurped, yet, what is much the same thing, the privilege granted by the commonwealth has been abused. The party against whom the information is prayed, has no claim but from the grant of the commonwealth, and an unfounded claim is an usurpation, under pretence of a charter, of a right never granted.

Having given my sentiments of the principle on which the present question turns, I will now consider the authorities in our own courts, which I think bear me out in the view I have taken of it. The first instance of an information in nature of a *quo warranto* was in the year 1799, in the case of the Commonwealth v. Wray, 3 Dall. 490; the defendant exercised the office of treasurer of Cumberland County. The next reported case is the Commonwealth v. Douglass, *et al.*, inspectors of the prison of Philadelphia, in the year 1803; the information was granted. 1 Binn. 77. In the year 1811, an information was asked and refused in the Commonwealth v. Smith, clerk of the market of Pittsburgh, 4 Binn. 117; the sole reason of the refusal was, that the supreme court had no right to try an issue at Pittsburgh, otherwise the information would have been granted. In 1815 an information was granted against Liberty Browne, who exercised the office of Collector of taxes in Philadelphia. The Commonwealth v. Woelper, *etc.*, is very much in point; there not only was an information granted against the defendants, who acted as vestrymen of the German American Lutheran Church of Zion, but on a trial they were convicted, and judgment of ouster given against them. If it be said that the defendants made no objection to the power of the courts, it is true; but yet it is of some weight that the able counsel for the defendants, in a case much litigated, either did not think of the objection, or supposed it was not tenable. Next came the case of the Commonwealth v. Cain *et al.*, vestrymen of St. Thomas' African Episcopal Church of Philadelphia, in the year 1820, 5 Serg. & Rawle 510; the information was granted without objection. Last of all was the Commonwealth v. Murray, who claimed to be the minister of the Wesley Church (in 1824, 11 Serg. & Rawle 73); there, the point now before us was directly in question for the first time; the information was refused, because the party who moved for it claimed in opposition to the charter under which the defendant held; the court declined an opinion on the right to grant the information but spoke of it as undecided, and worthy of consideration. That is the only case in which there has been any suggestion of doubt; in all the others the right was taken for granted. From the cases cited in this argument, from the Massachusetts and New York reports, I conclude, that the judges of these states are in favor of the right to grant this information. I am of the opinion that this court has the right of granting, and at the same time, the right of refusing according to circumstances.

See also *Davidson v. State*, 20 Fla. 784; *State v. Ashley*, 1 Ark. 513; *Covington, etc., Co. v. Moore*, 3 Ind. 510; *Attorney-General v. Looker*, 111 Mich. 498; *People v. Albany, etc., R. Co.*, 57 N. Y. 161; *Hunt v. Cemetery Asso.*, 27 Kans. 734; *Jenkins v. Baxter*, 160 Pa. St. 199; *Owen v. Whitaker*, 20 N. J. Eq. 122.

b. *English rule.*

REGINA v. MOUSLEY.

1845. COURT OF QUEEN'S BENCH (ENGLAND) 8 Q. B. 946, 16 L. J. Q. B. 89; 11 Jur. 56; 70 Rev. Rep. 698.

SIR F. THESIGER, solicitor general, in Trinity Term 1844, obtained a rule calling upon the defendant to show cause why a *quo warranto* information should not be exhibited against him to show by what authority he claimed to be a master at the Hospital and Free School of Sir John Port, Knight, in Etwall and Repton, (otherwise Rep-pingdon,) of the foundation of the said Sir John Port, Knight; upon the grounds that he was not duly elected or appointed master, that his appointment was improperly obtained, and on other grounds, (stated in the rule) setting forth objections to the appointments more specifically.

The case was argued at Hilary and Trinity Terms 1845.

Kelley, Clarke, Serjt. and Peacock showed cause:—

This is not an office for which an information in the nature of *quo warranto* will lie. Neither the crown or the public is interested in this franchise, if it be a franchise at all. There is merely a charitable bequest carried out by certain machinery regulated by a charter and a private act of Parliament. Informations under Stat. 9 Anne Ch. 20, s. 4, issue only in the cases enumerated in the preamble to sect. 1; and this office cannot be said to fall under the head of "offices, within cities, towns corporate, boroughs, and places." The cases on this subject are collected in 2 Selw. N. P. 1145, etc. (10th ed.) p. 1157 of 11th ed. In *Rex v. Ogden*, 10 B. & C. 230, 233, Bayley, J., said:—"There is no instance of a *quo warranto* information having been granted by leave of the court against persons for usurping a franchise of a mere private nature not connected with public government." In *Rex v. Ramsden* (42 R. R. 431, 3 Ad. & El. 456) and *Rex v. Hanley*, 42 R. R. 434, 3 Ad. & El. 463) the information was refused in the case of offices much more nearly public than this. The former decision overrules *Rex v. Beedle*, (42 R. R. 437, 3 Ad. & El. 467) where, however, there was a fair ground for contending that the office was public. In *Rex v. The Master and Fellows of St. Catherine's Hall* (2 R. R. 369, 4 T. R. 233) this court held that St. Catherine's Hall in the

University of Cambridge, was a private eleemosynary lay foundation, and refused a mandamus to compel the masters and fellows to declare a vacancy of a fellowship, on the ground that the crown was visitor, and the jurisdiction was to be exercised by the great seal; and Lord Mansfield's opinion in *Rex v. Gregory*, (2 R. R. 371, 4 T. R. 240) was treated as an *obiter dictum*. *Rex v. Shepherd* (2 R. R. 416, 4 T. R. 381) where an information was refused for an office of a church warden, is an authority against the rule. In *Rex v. Bumstead*, (36 R. R. 717, 2 B. & Ad. 699) the information was granted; but that was the case of a city company exercising municipal powers. Even if the information lie, this is not a case where the court, in its discretion would exercise the power. (As to this *Rex v. Dawes*, 4 Burr. 2022, *Rex v. Wardroper*, 4 Burr. 2024, *Winchelsea causes*, 4 Burr. 1962, *Rex v. Parry*, 45 R. R. 614, 6 Ad. & El. 810, *Rex v. Sergeant*, 5 T. R. 466, were referred to.)

Sir F. Thesiger, Solicitor General, *Whitehurst & Gale*, *contra*:

This is a case in which, if a *quo warranto* lies, it ought to be granted.

(Patteson, J.—The main question is, whether the information can be issued in such a case. We should hardly decide the other points at this stage.)

The writ ought to be granted, to raise the question whether it lies or not, which the prosecutor cannot otherwise try. In *Rex v. Marsden*, (3 Burr. 1812) the court expressly forebore to decide whether or not they could grant a *quo warranto*, at the instance of a private relator, for holding a market; and they gave judgment on the ground that the defendants were charged, not with holding a market, but with encouraging its being held. The passage in 2 Selwyn N. P. 1145, (10th ed.) tit. *Quo warranto*, referred to on the other side, is corrected in Tancred on *Quo Warranto*, p. 14, as follows, with respect to the statement that "before the statute of Queen Anne" (9 Anne Ch. 20) "a private person could not interpose in *quo warranto*." "This statement is made by the learned writer upon the authority of Lord Mansfield, from a manuscript report of *Rex v. Trelawney*, (2 Sely. N. P. 1146, s. c. 3 Burr. 1615). In the printed report in Burrow, the same view seems to have been taken by Mr. Justice Wilmot. *Rex v. Trelawney* came before the court in Hil. 5 Geo. III, and consequently preceded the discussion on this subject in *Rex v. Marsden*, (3 Burr. 1812) and *Rex v. Breton et al.* (4 Burr. 2260); by which it is probable that Lord Mansfield's opinion was changed. For in East. Term, 12 Geo. III, *Rex v. Gregory*, (2 R. R. 371, 4 T. R. 240) appears to have been decided, in which Lord Mansfield expressly asserts, that informations were exhibited by the coroner before the 9th Anne. The records of the crown office leave no room to doubt, that informations were filed by the coroner anterior to that statute, even in cases directly within its provisions, which clearly shows, that this latter statute did not

first introduce these informations, but only made some regulations with respect to the prosecution of them." ("2 Kyd, *ib.*") The discussions as to relator's costs on *quo warranto* in such cases as *Rex v. Wallis*, (5 T. R. 375) and *Rex v. McKay*, (5 B. & C. 640) would have been superfluous if it had been clearly established law that *quo warranto* does not lie at all, at the instance of a private relator, in a case not within the statute 9 Anne, Ch. 20. Private relators have been held to be excluded, in cases alleged to fall under that act, because the word "places" in the recital of sect. 1, applied only to places, *ejusdem generis* with those previously specified; and, again, rules for a *quo warranto* information at the instance of a private relator have been discharged, in cases of a nature as little public as this, because no such corporation existed as that described; *Rex v. Duke of Bedford*, (1 Barnard, K. B. 242, 273, 280), *Rex v. Ogden*, (34 R. R. 375, 10 B. & C. 230, 233), or on the merits of the application, as in *Rex v. Attwood*, (38 R. R. 290, 4 B. & Ad. 481), but without resting the decision on the general incompetency of such relators. In *Rex v. Ramsden*, (42 R. R. 431, 3 Ad. & El. 456,) this court refused to grant a *quo warranto* information for exercising the office of governors and directors of the poor of St. Andrew, Holborn; in *Rex v. Hanley*, 42 R. R. 434, 3 Ad. & El. 463, they doubted whether such information lay in the case of trustees under a local act for certain parochial purposes; and in *Rex v. Beedle*, (42 R. R. 437; 3 Ad. & El. 467), they granted a rule *nisi* for a *quo warranto* information for exercising the office of commissioner under a paving and lighting act. In none of these cases was a franchise of the crown infringed; and this, probably, was the ground of decision in *Rex v. Ramsden*, (42 R. R. 431, 3 Ad. & El. 456) the only one of them in which the court gave a judgment adverse to the present application. So in *Rex v. Daubney*, (1 Bott. pl. 347, pl. 358, 6th ed.) where a *quo warranto* information was moved for against a church warden, the court refused it, "a church warden not being such a public officer against whom an information would lie; for it was no usurpation upon the crown." Here the defendant is wrongfully exercising an office established under royal charter, and is, therefore, usurping upon the crown. In *Rex v. Gregory*, (2 R. R. 371, 4 T. R. 240) where the application related to a fellowship in Trinity Hall, Cambridge, Lord Mansfield, clearly was of opinion that the court might have granted the information if the case had required it. *Ex parte Wrangham*, (2 Ves. Jr. 609) does not conflict with that decision: the Lord Chancellor there held only that, under the circumstances of that case, the visatorial power which devolved upon the crown might fitly, in point of expediency, be exercised by the court of chancery. In *Rex v. The Masters and Fellows of St. Catherine's Hall* (2 R. R. 369, 4 T. R. 233) the court of king's bench refused

to *interriere*, only because a visatorial power had devolved upon the crown, which this court did not think it proper to exercise.

(PATTESON, J.—Have you been able to find any instance of a *quo warranto* for the purpose of trying the right to be master of a hospital?)

In *Rex v. Atwood* (38 R. R. 290, 4 B. & Ad. 481), this court was of opinion that it might issue to try the right to be master or warden of a company in the city of London. In *Rex v. The Duke of Bedford* (1 Barnard, K. B. 242, 273, 280) the conservators of the level were only private undertakings; yet it seems that that was not deemed an objection to the *quo warranto* issuing. And in many cases, where powers of the same nature are exercised, there would be no redress against usurpation if the court would not interfere in this way. The power to grant *quo warranto* informations according to the sound discretion of the court in cases other than those provided for by the statute of Anne is impliedly recognized in *Rex v. Howell* (Ca. K. B. temp. Hardw. 247) and directly in *Rex v. Highmore* (5 B. & Ald. 771.)

There may be no instance of such an information granted in a case strictly private; but it cannot be shown that the court has ever refused so to interfere where a franchise derived from the crown has been usurped upon. Nor is it to be assumed that the office in this case is strictly private; it has annexed to it one public function at least, that of preaching at stated times in the parish church. If any authorities appear to raise any doubt as to the remedy by *quo warranto* information in the case of a fair, market or leet, they may be reconciled with the proposition now contended for by observing that, if the existence of the franchise be altogether denied, the question may be tried by an action, and *quo warranto* may not be the proper remedy; but it is otherwise where the franchise clearly exists and the only question is whether or not it has been usurped.

(PATTESON, J.—What franchise do you say proceeds from the crown in this case? Is anything established here which the founder might not have settled by his will, without the aid of the crown?)

The charter makes more comprehensive provisions than the will, and extends to property not comprised in it, and creates a corporation which the will could not have done. The language of the court in *Rex v. Ogden*, (34 R. R. 375, 10 B. & C. 230) as to the cases in which *quo warranto* informations may be granted, is explained by *Rex v. White*, (44 R. R. 515, 5 Ad. & El. 613) and by 2 Roll. Rep. 115 (*Leroy v. Cusacke*) cited in Com. Dig. *Quo Warranto* where it is said that (C. 3) “if an information be for using a franchise, by a corporation, it ought to be against the corporation.” If for usurping to be a corporation, it ought to be against the particular persons.

Cur. adv. vult

PATTESON, J. in this term (May 4th) delivered the judgment of the court:

This case, which was argued, in the absence of my lord, before my brothers Coleridge, Wightman, and myself, stood over in the consequence of the pendency before the House of Lords of the case of *Rex v. Darley*, (12 Cl. & Fin. 520) in which it was thought probable that some principles of the law applicable to the present case might be laid down.

The case has not yet been decided; but it cannot affect the present, inasmuch as the only point contended for in it is, that an office of a public nature created by an act of parliament may be the subject of proceedings by writ of *quo warranto*, though strictly speaking there be no usurpation upon the crown. The law therefore remains precisely as it was before, as to offices of a private nature.

Here the office is that of master of an hospital founded by a private individual by will, having no public duties or jurisdiction of any kind; which was so clear that the learned counsel in arguing were obliged to contend that a provision in the will, that the master should preach a certain number of sermons in the parish church, created a public duty, it being obvious that the founder could not confer the right of so preaching without the consent of the ecclesiastical authorities, and that the public had nothing to do with it, or any right to enforce the performance.

It is true that a charter was obtained from the crown according to the will of the founder, in order to incorporate the members of his foundation. But that alone is quite immaterial, as the crown neither added anything to the foundation, nor reserved to itself any control over it.

An act of parliament was passed in modern times to extend this foundation, and to make some alterations which by circumstances had become necessary and desirable; but it did not create a new corporation; nor did it confer any jurisdiction of a public nature, or enjoin any duty of the sort.

We are therefore clearly of the opinion that the writ of *quo warranto* is not applicable to a case of this sort, and that the rule for granting it must be discharged.

Rule discharged.

See also *Haupt v. Rogers*, 170 Mass. 71; *Attorney-General v. Drohan*, 169 Mass. 534; *Eliason v. Coleman*, 86 N. Car. 235.

7. An actual user of the office must be shown.

PEOPLE EX REL. TAYLOR ET AL. V. THOMPSON ET AL.

1837. SUPREME COURT OF NEW YORK. 16 Wend. 654.

QUO WARRANTO. The attorney general filed an information in the nature of a *quo warranto*, charging the defendants with claiming, using and exercising the liberties, privileges and franchises of being a body politic and corporate; by the name of the Harlem Bridge Company, and to have and maintain a bridge across the Harlem River, and to ask, demand and take tolls, and duties from all persons using the bridge; and also the liberties, privileges and franchises of acting within this state, towit, at, etc., as a corporation by the name of the Harlem Bridge Company, without being legally incorporated, and as such corporation of having and maintaining a bridge, etc. To that portion of the information charging the defendants with claiming and exercising the liberties, privileges and franchises of being a body politic and corporate, and of acting within the state as a corporation, they answered that they never used such liberties, privileges and franchises; and to that portion of their information charging them with claiming the privilege of maintaining a bridge and demanding tolls, they set forth their title under various acts of the legislature. The attorney general demurred to the answer, for the clause that it did not meet the charge of a claim on the part of the defendants to be a body politic and corporate, and the defendants joined in demurrer. The pleadings also presented the rights of defendants upon the merits, upon which the court passed; but as the questions discussed and determined are not of general interest, the report of the case is restricted to the question of pleading as above presented.

By the court, NELSON, C. J. The demurrer of the attorney general to so much of the plea as professes to answer the first count of the information, raises the question whether, under the provisions of the revised statutes authorizing an information in the nature of a *quo warranto*, 2 R. S. 581, § 28, the defendants are bound to answer specifically the averment that they claim to use and exercise a franchise, within this state, without any warrant or grant for that purpose. If they are obliged to answer the charge of a mere claim to exercise corporate privileges, disconnected from any allegation of user, then undoubtedly, the plea is bad, for it contains only a denial of the user. The defendants, if so bound to answer, should have set forth title, or disclaimed. The language of the statute so far as concerns this case, is as follows: "an information in the nature of a *quo warranto* may be filed, etc., where any person shall usurp, intrude into or unlawfully hold or exercise any public office, civil or military or any franchise within this state"; or "where any associa-

tion or number of persons shall act within this state as a corporation, without being legally incorporated." The first clause seems obviously to require something beyond a claim to an office, or to the exercise of a franchise, to authorize the institution of proceedings; and the last confines the proceedings expressly to the case of persons acting as a corporation. To "usurp, intrude into or unlawfully hold or exercise", an office or franchise, which last term may include corporate powers, means to take possession of the office or franchise without right, or unlawfully to hold or use the same after possession has been rightfully or wrongfully acquired.

The words of the statute were taken from the 9th Anne, ch. 20, § 4, under which act it has been repeatedly determined there must be a user or possession of the office or franchise, to authorize the information, and that a mere claim is insufficient. *Rex v. Ponsonby*, 1 Ves. Jr. 1; *Rex v. Whitwell*, 5 T. R. 86; Bull. N. P. 211; 4 East 337; 3 Bac. Abr. 645; Wilcocks on Cor. 462, pl. 254-5-6; Angell on Cor. 486. It was insisted on the argument by the counsel for the people, that this was only a rule of practice which the king's bench had established and applied on a motion for leave to file an information. An examination of the authorities will show that such a proposition cannot be maintained. The case of *Rex v. Ponsonby*, which is a leading one, underwent very full discussion. It originated in the K. B. in Ireland (the statute there being a copy of 9 Anne), and came before the K. B. in England, on error in 1755, where the judgment was reversed, which reversal was afterwards sustained in the house of lords. The information was filed against seven persons, charging them with usurping the office of free burgesses, of the corporation of Newtown. The question whether it would lie against two of them, who, though elected, had not been admitted or sworn in, came up on the pleadings. Chief Justice Rider, who delivered the opinion of the court in error, states one question to be, "whether it (the information) lies against the non-acting burgesses," and adds "it clearly cannot, upon this ground, that under the words of the statute, there must be usurpation, intrusion or unlawful holding. Now, claiming, which only appears against them (they had claimed in their plea to be admitted, and sworn in), can by no construction be taken to amount to any of these, and it would be strange to imagine the statute intended ever to prevent the asserting or claiming a right". "The practice now generally", he says, "is to have an affidavit of some act of usurpation, upon application to the court for leave to file an information." This practice, as appears from the above authority, is not an arbitrary regulation of the court; it is the evidence of a fact before the institution of the proceedings to bring the case within the provisions of the statute; and without the existence or proof of which, those proceedings would be ineffectual if permitted. It is the establishment of a *prima facie* case for the interference of a court, and which if sustained upon a mere

formal and deliberate litigation, will justify a judgment of ouster. All the precedents in the books support this view. I have examined some thirty, every one of which charge that the defendant or defendants did use and exercise, and from, etc., to the exhibiting of the information, hath or have used and exercised, etc. The 48th section of the statute, 2 R. S. 595, may also be referred to, which prescribes the judgment in case of conviction. If the defendant be "found or adjudged guilty of usurping or intruding into, or unlawfully holding or exercising any office, franchise or privilege, judgment shall be rendered that such defendant be ousted, and altogether excluded from such office, franchise or privilege", etc. It would seem something like an absurdity to give judgment of ouster against a person, from an office which he never was in, or from a franchise which he never held or used. If the above view be correct, then the first count in the information is fully answered by the plea. It denies the allegation of using and exercising the franchises and privileges as a corporation, which constitutes the gravamen of the charge. If this is not admitted on the record, or proved in case of denial, no judgment can be rendered against the defendants. It contains the very essence of the complaint under the statute.

Judgment for defendants.

See also Reg. v. Pepper, 7 A. & E. 745; Reg. v. Archdall, 8 A. & E. 281.

8. Will not issue against mere servants.

COMMONWEALTH v. DEARBORN ET AL.

1818. SUPREME JUDICIAL COURT OF MASSACHUSETTS. 15 Mass.
125.

THIS was an information in the nature of *quo warranto*, filed by the Attorney and Solicitor General in behalf of the Commonwealth, alleging that the defendants, for the space of three months before the filing of the information, had used and exercised and still did use and exercise, the office, liberty and franchise, of managers of a lottery, granted by the legislature to the proprietors of Kennebeck Bridge; which office, etc., they are charged with having usurped upon the government of the Commonwealth; and thereupon process is prayed against them, that they may be held to answer to the commonwealth, by what warrant they claim to hold, use and exercise and enjoy, the said office, liberty and franchise. * * *

The counsel on both sides being present at the following November Term in Essex, the question whether the information lay was argued at much length by them and it was afterwards determined

by the court, that the defendants as managers of a lottery granted to a corporation, and appointed to the trust by the corporation, were not such officers as were liable to the process which had been instituted in this case. They were the private officers or servants of the corporation, and removable by it at pleasure, or at least for good cause. The only effect of a judgment against the defendants upon this information would be their removal from office. But such a judgment would be nugatory, for the corporation might immediately reinstate them. Those against whom such an information lies must claim to exercise some public office or authority. The defendants were accordingly discharged.

See also *Philips v. Commonwealth*, 98 Pa. St. 394, professor in a college; *State v. Cronan*, 23 Nev. 437, superintendent of a corporation; *Commonwealth v. Murray*, 11 S. & R. (Pa.) 73, minister of a church; *People v. Hills*, 1 Lans. (N. Y.) 202, secretary-treasurer of a railroad company.

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9. Relator's interest where the dissolution of a corporation is sought.

MURPHY v. FARMERS' BANK OF SCHUYLKILL COUNTY.

1853. SUPREME COURT OF PENNSYLVANIA. 20 Pa. St. 415.

B. H. BREWSTER & CUMMING for the respondent, in support of the motion to quash.—It was observed that the relator was not connected with the bank; that he was not a stockholder or officer, debtor or creditor of the bank, and was not sustained by the Commonwealth. It was stated that the English Courts, in construing the statutes of 4 & 5 W. & M., 9 Anne, and 32 Geo. III, have refused the writ of *quo warranto* upon the relation of an intruder, when seeking the forfeiture of such a charter as the one in question, and have confined such writs to "cases affecting rights as between party and party". 3 Burr. 317; *Rex v. Williams, Selwyn*, N. P. 1157, Com. Dig. C. 3, tit. *Quo warranto*; 1 W. Bl. 187. In the case in 2 Burr. 869, Lord Mansfield said, that the "statute of 9 Anne was calculated to operate only against individuals usurping offices or franchises, and not against any corporation itself as a body. Though the court will grant a *quo warranto* information, at the instance of a relator, against a member of a corporation, on grounds affecting his individual title, although the same objections apply to the title of every member, 5 Ad. & El. 613; yet an information for dissolving a corporation, or of seizing its franchises, cannot be prosecuted but by authority of the crown, or of the commonwealth, or by a public officer in its behalf. 10 B. & C. 230; 11 Ad. & El. 949; 2 B. & A.

482; 1 T. R. 3; Bac. Abr. Information, D; 5 Mass. 230; Commonwealth v. Union Fire Insurance Company, 16 Serg. & R. 140, 144-5; 1 Penna. Rep. 426; 7 Barr. 34; Com. v. Burrell, 1 McCord 35; *id.* 52; 4 Gill & J. 1; * * *

The opinion of the court was delivered April 4, by

WOODWARD, J. The principal reason assigned for the motion to quash this writ of *quo warranto*, is, that the suggestion is at the instance of a private relator, instead of the attorney general. The respondent is a corporation, deriving its existence from legislation enacted in the forms of the constitution, and the object of the relator is to put it out of existence—to declare its franchises forfeited to the commonwealth. He is not a stockholder in the bank, is not a creditor, and claims no office or other private right in the corporation. Essentially therefore this is a public prosecution of the bank, though set on foot by an individual, and has for its object the recovery of a forfeited franchise, and not the redress of a private grievance. * * *

The question now raised is, whether such a prosecution can be conducted in this court at the suggestion of a private relator. This question depends on the construction of the act of June 14th, 1836, for, independently of that act, it is beyond dispute that the Commonwealth only could have *quo warranto* for the purposes of the present proceeding. * * *

(The court after discussing the force and effect of the Pennsylvania Statute conferring concurrent jurisdiction upon the several courts of common pleas with the supreme court in issuing writs of *quo warranto*, and holding that, the substance of the statute of Anne had been adopted as a part of the common law, of the state, continues),

* * * These words have been the subject of judicial decision, and the authorities show that they do not give a private relator the writ of *quo warranto* in a case of public prerogative involving no individual grievance. On this point the authorities are full, direct and harmonious. The usurpation of an office, established by the constitution, under color of an executive appointment, and the abuse of a public franchise under color of a legislative grant, are public wrongs, and not private injuries, and the remedy by *quo warranto*, in this court at least, must be on the suggestion of the attorney general, or some authorized agent of the Commonwealth.

For the authorities I refer myself to those cited in the argument of the respondent's counsel. They establish this as the uniform construction in questions involving the existence of a corporation. In questions involving merely the administration of corporate functions or duties which touch only individual rights, such as the election of officers, admission of a corporate officer, or member, and the like, the writ may issue at the suit of the attorney general, or of any person or persons desiring to prosecute the same.

What is a corporation? A franchise. And Blackstone defines a franchise to be a part of the royal prerogative existing in the hands of a subject. The sovereignty of every state must be lodged somewhere. Limited by such concessions as popular violence has from time to time wrung from reluctant monarchs, it resides in England in the crown. In Pennsylvania, it resides in the whole mass of the people, and the three co-ordinate departments of government are the trustees appointed by the people for the exercise of so much of their sovereignty as they have not, by the bill of rights, denied them, nor by the constitution of the United States yielded to the general government. The legislature of Pennsylvania may establish a corporation, that is, grant out a part of the sovereignty of the state, because, being a general trustee for the people, and not forbidden, they are qualified to do so. The general government being a government of derivative powers, Congress cannot establish a corporation, because the power to do so is not granted. Our legislature can because the power is not withheld. A corporation then exists in Pennsylvania by virtue of the constitutional exercise of the sovereign power. Its existence is proof of the public will, which is nothing else than the will of the majority. Can one man so employ the departments of the government as to tear down the fabric of a majority? Regarding the judiciary as one of the trustees of the sovereignty of the people, by which I mean the whole people, how can its functions be called into exercise against the existence of a public institution, except upon the suggestion of some agent of the whole people? If they may, if individual caprice, passion, prejudice or interest may use the judicial arm of the government to overthrow what the legislative or executive arms have erected, the sovereignty of the majority is extinguished, and the departments of the government, intended to work in harmony, are brought into fatal conflict. A house divided against itself cannot stand, and no more can a state. If *quo warranto* be given to individuals to dissolve corporations, power will cease to steal from the many to the few for here will be a transfer of it bodily. With a corrupt judiciary, which the history of other countries teaches us is not an impossible supposition, acting as the instrument of private passions, any institution established by the immediate representatives of the people, and existing by will and consent of the people, and for their convenience and benefit, may be frustrated without appeal or recourse.

These are general views which harmonize with the doctrine of the cases. And, therefore, whilst I recognize the right of any relator to have a *quo warranto* in the supreme court who is desirous to prosecute the same to redress any private grievance that falls within that remedy, I deny the right of any party except the attorney general, or other officer of the commonwealth, to sue for it to dissolve a corporation. I do not say what may be the proper construction of the words, copied twice into the second section of the act of 1836

from the statute of Anne. We have seen that they apply exclusively to the common pleas and as a statutory provision have no application to the supreme court. The construction of them, therefore as a part of the act of 1836, is not involved here. When a case comes up from the common pleas requiring them to be construed, it will be time enough to consider whether they have acquired any new significance or force by their Pennsylvania enactment.

Another question is made here which deserves to be noticed, because it touches the practice in cases like the present. It is said the writ can only be issued after a rule to show cause; and for that Jones' case in 2d Jones, is an undoubted authority. The statute of Anne has the words by the leave of the court, and the fifth section of the act of 1836, applicable alike to the Supreme Court and the Common Pleas, provides that the writ may issue with the leave of the court in term time, or of a judge in vacation. This is sufficiently complied with by the motion which is made, and the allowance of a writ without a hearing. But all analogy and principle show that the party respondent must have a hearing before he is put to answer. This we allow him in a motion to quash the writ. And notwithstanding what was said in Jones' case, we are inclined to sustain this practice, and dispense with the preliminary rule. It is a matter of form and not of substance; so that the respondent is secure of his preliminary hearing, it matters little whether it be on a rule to show cause, or the less cumbrous motion to quash.

And now, April 4, 1853, this cause having been fully heard, it is considered and adjudged, that the relator, Michael Murphy, has shown no right or title to maintain the information in the name of the Commonwealth; and that the same be and is hereby quashed, and wholly taken for naught; and that the relator pay to the defendants their lawful costs in this behalf expended.

As to form of information when filed against a private corporation, see *State v. Cincinnati, etc., Co.*, 18 Oh. St. 262.

Section 4.—The Parties.

1. State or people as plaintiff.

WALLACE v. ANDERSON.

1820. SUPREME COURT OF THE UNITED STATES. 5 Wheaton 291.

ERROR to the circuit court of Ohio.

This was an information for a *quo warranto*, brought to try the title of the defendant to the office of principal surveyor of the Virginia Military bounty lands north of the river Ohio, and between the rivers Scioto and Little Miami. The defendant had been appointed to the office by the state of Virginia and continued to exercise his duties until the year 1818, during all which time his official acts were recognized by the United States. In that year he was removed by the governor, and council of Virginia, and the plaintiff appointed in his place. The writ was brought, by consent of parties, to try the title to the office, waiving all questions of form and of jurisdiction. Judgment was given in the court below for the defendant, and the case was brought by writ of error into this court.

MR. CHIEF JUSTICE MARSHALL delivered the opinion of the court, that a writ of *quo warranto* could not be maintained except at the instance of the government, and as this writ was issued by a private individual, without the authority of the government, it could not be sustained, whatever might be the right of the prosecutor, or of the person claiming to exercise the office in question. The information must therefore be dismissed.

Judgment reversed.

Judgment.—This case comes on to be heard on the transcript of the record of the Circuit Court for the District of Ohio, and was argued by counsel. On consideration whereof, this court is of the opinion that no writ of *quo warranto* can be maintained, but at the instance of the government; and as this writ is a writ issued by an individual without the authority of the government, it is the opinion of this court that the same cannot be sustained, whatever may be the right of that individual, or of the person who claims to exercise the office, to try the title to which the writ is brought. It is therefore the opinion of this court, that the judgment of the circuit court ought to be reversed and the cause remanded to that court, with directions to dismiss the information because it is not filed at the instance of the United States.

STATE EX REL. GILES V. HARDIE.

1840. SUPREME COURT OF NORTH CAROLINA. 23 N. C. 42.

(INFORMATION in *quo warranto* filed by the solicitor for the state charging respondent with unlawfully using and exercising the office of sheriff of Rowan County and alleging specifically that at the time of the election of said respondent to the office of sheriff he was not possessed of a freehold of one hundred acres in fee simple as provided by law. Respondent pleaded to the information denying specifically the charges therein contained. Demurrer.)

Counsel for defendant contended that the whole proceeding ought to have been dismissed, because the defendant could not be called to answer the information:

1st. The act concerning writs of *quo warranto* and mandamus, 1 R. S., ch. 97, though general in its terms, is not applicable to the office of sheriff.

2d. If the office of sheriff be embraced in the act, or must be construed to be within its provisions, then the proceeding, being a criminal one, is prohibited by the eighth section of the Bill of Rights, and the legislature had no right to pass the act. That the proceeding is of a criminal nature, see 2 Hawk. Pl. Cro., ch. 26, sec. 16; 1 Tremain's Pleas, 253; 6 Wentworth, 28 *et seq.*: Attorney General v. Utica Insurance Company, 3 Johns. Ch. Rep. 371.

3d. The information is fatally defective, because it does not show upon its face that it was filed by leave of court. An information in England does not show this; but there is reason for a difference there and here. There, the power to file an information is not given by statute, but is only regulated by it; but, in this state the power is given by the statute and none exists in the solicitor without it.

4th. The information is totally defective in form and substance. See 6 Wentworth's Pleas, 28, for a proper form.

5th. The judge erred in saying that the pleas could not be sustained, although the county court had decided the question. * * *

The Attorney General and Barringer for the state, contended that the act applied to every office. Writs of Mandamus and *quo warranto* were writs known to the common law; and the statute of 9 Anne, and 4 & 5 Will., and Mary, only regulated them. Our act embraces the office of sheriff in its terms. See Bac. Abr. tit. Information, letter D; Bull. N. P. 210, 212; People v. Van Slike, 4 Cowen's Rep. 297.

2d. The argument that the act is unconstitutional is based upon the supposition that the proceeding is a criminal one; but it has always been regarded as a civil proceeding, though in some measure in the nature of a criminal one. 4 Cowen's Rep. 100; note A in People v. Richardson; People v. Clerk, 4 Cow. Rep. 95; 15 Johns. Rep. 387.

3d. To the objection that the information does not show that it was filed by leave of the court, the reply is, that it was unnecessary; and if it were, the court's entertaining and acting upon it shows that it had its sanction.

4th. As to the informality of the proceeding the defendant is too late to avail himself of it after plea. 4 Term. Rep. 276; Com. Dig. tit. *Quo Warranto*; 3 Term. Rep. 596; 599, note A; if an information be informal, the proper motion is to quash it; but after plea it cannot be quashed. 4 Burr. 2297. The defendant had no right to plead double. 7 Eng. Com. Law Rep. 254. * * *

GASTON, J., delivered the opinion of the court. (Omitting that portion of the opinion respecting the right of the county court to render a conclusive judgment in the case of contested elections.)

* * * It is insisted, nevertheless, on the part of the appellant, that if the plea in question be bad in substance, nevertheless the judgment on the demurrer is erroneous, because the information is altogether illegal, or if legal, is wholly insufficient. It may be doubted whether these grave inquiries are fit to be considered now, when the question before us is on the interlocutory judgment overruling the plea. But as they have been argued on both sides, and been fully considered, and as our minds are quite made up on them, we have no hesitation in declaring our opinion.

It is objected in the first place, that an information of the kind before us, is utterly prohibited by the eighth section of our Bill of Rights, which declares that "no freeman shall be put to answer any criminal charge but by indictment, presentment or impeachment." The enquiry is, whether the information in question be, within the meaning of the Bill of Rights, a "criminal charge". In every well regulated government there must be some mode by which to put down the usurpation by unauthorized individuals of public power. In the country of our ancestors, and in ancient times, when any of the offices or franchises appertaining to sovereignty, and therefore called royal, were supposed to be held or exercised without lawful authority, the remedy was by suing out the writ of *quo warranto*, to enquire by what warrant the supposed usurper supported his claim, in order to determine the right thereto. This was said to be in the nature of a writ of right, for the king, and from what we have seen of the pleadings in it, bore little or no resemblance to a criminal prosecution. See Rastell's entries *Quo Warranto*. Indeed Mr. Justice Wilmot, in *Rex v. Marsden*, 3 Burr. 1817, declares positively that it is not a criminal prosecution, but a civil writ at the suit of the crown, though Chancellor Kent in *People v. The Utica Insurance Company*, 2 Johns. Ch. 117, speaks of it as a criminal proceeding. Be this as it may, the remedy certainly resembled, if in truth it were not a real action; and, like other actions of that family, was subjected in its prosecution to inconvenient delays. On this account, like most real actions, in process of time it became much

disused, and its place was supplied by "an information in the nature of a *quo warranto*." Originally this was a criminal proceeding. In it the usurpation was charged as an offense, and the offender, upon conviction, was liable to be punished by fine and imprisonment. Such, however, were the conveniences attending the information, as a mode of trying the mere question of right to the office or franchise that although it never entirely lost its form as a criminal proceeding, it was so modeled as to become substantially a civil action. A fine, indeed, was imposed upon conviction; but it was nominal only—no real punishment was inflicted—and it became, before our revolution, the general civil remedy, for asserting and trying the right, in order to seize the franchise, or office, or to oust the wrongful possessor. See 3 Bl. Com. 262-3; *Rex v. Francis*, 2 Term. 484; *Com. v. Brown*, 1 Serg. & Rawl. 385; *People v. Utica Insurance Co.*, 15 Johns. 386.

Besides this peculiar information, well known as the information in the nature of *quo warranto*, there was a mode of prosecution for the punishment of crimes by "information." This was, by a suggestion or charge, drawn up in form, and filed on record by the King's Attorney General, or by his coroner or master of the crown office, in the court of King's Bench; and was deemed sufficient in every case not capital, to call every man to answer to the offense therein charged. There could be no doubt but that this mode of criminal prosecution was as ancient as the common law itself, but the tyrannous use made of it in high prerogative times, especially after jurisdiction of criminal prosecutions by information was extended to other tribunals besides the court of King's Bench, justly subjected it to the reprobation of the friends to freedom. The framers of our Bill of Rights were not school men dealing in metaphysical abstractions, and busied about technical forms, but practical statesmen guarding against real abuses of power, and securing the substantial rights of freemen. They intended to prohibit this mode of prosecution for crimes, and to throw around the object of penal visitation the protection either of a grand jury, or of an enquiry by the impeaching body—before he could be required to plead to a criminal accusation. Such is the purpose of the eighth section of the Bill of Rights; and accordingly, we find it connected with a number of provisions from the 7th to the 10th inclusively, in which are embodied the securities for a fair hearing, full defense, impartial trial, and the administration of justice in mercy to all sought to be convicted and punished because of public offenses. The proceeding before us is carried on *diverso intuitu*, and to hold it prohibited by the Bill of Rights, would be to sacrifice substance to mere form. If, indeed it should ever be attempted in informations of this character, to impose a real fine, or to inflict any other punishment, so as to make them in effect criminal prosecutions, such attempts would fall before

the explicit prohibitions of the section of the Bill of Rights now needlessly invoked.

In the next place it is objected that the present information purports to be framed in conformity to the provisions of our act, of 1836, "concerning writs of *quo warranto* and *mandamus*" (1 R. S., ch. 97); but on a fair examination of that act, it will be found not to warrant this proceeding. It is admitted that the words of the act are sufficiently broad to take in the case, for they declare it lawful for the attorney general or solicitors of the state, where any person shall hold or execute any office, or franchise unlawfully, to exhibit with the leave of the court, an information in the nature of a *quo warranto*, at the relation of any person desiring to prosecute the same. But it is argued these words must be taken with some qualification. The act has been modeled after the English statute of 9th Anne, which, in terms, is confined to informations respecting the disputed offices and franchises of boroughs and corporations; and although this act cannot be so restricted, yet (it is said) many of its provisions show that the legislature had in view contests between different claimants to offices and franchises, and its enactments ought to be understood with reference to contests of this description only. Here, it is not shown what interest or claim the relator, Henry Giles, had in or to the subject matter of this controversy, and it cannot be intended that the legislature meant that he or any other officious stranger, might, under the cover of this act, and in the guise of a relator, call on any officer of the state, governor, sheriff or judge, to show the warrant for his public acts, in order to spy out, if possible, some defect of title.

We have before had occasion to say (see *State v. King*, decided at this term), that there are some provisions in this act as to proceedings by *mandamus*, which must be regarded as applicable only to contests between individuals. But we cannot yield to the argument that the enactments of the statute were not meant to apply to any other. The purpose of the legislature, we have no doubt, was as broad and comprehensive as the terms of the act indicate; that is to say, to regulate the mode by which all usurpations of offices and franchises might be examined and determined in the courts of justice, "as is usual in cases of information in the nature of a *quo warranto*." Such informations lay at the common law, independently of any statute, for intrusion into any office affecting the public, or for the exercise of a franchise of what was termed a regal character. Buller's *Nisi Prius* 211; *The King v. Highmore*, 5 Barn. & Ald. 771; Com.'s *quo warranto*, A. B. The object of the statute of Anne was to regulate the proceedings thereon in certain cases relating to corporations, and our legislature followed that statute as a fit model for regulating the proceedings on informations generally. There can be no serious danger that, under our act, the public repose will be capriciously disturbed, since no information under

it will lie, but with leave of the court, and then must be prosecuted by the proper law officer of the state upon his official responsibility. Whether in this case, it was necessary that any relator should be named, we stop not to enquire. For whether he be named or not, the information is that of the solicitor of the state; and we hold it to be clear that under our act "concerning the attorney general and solicitors for the state", each solicitor within his respective circuit, holds in all pleas of the state, the same authority which the attorney general may exercise therein, within his circuit. There is nothing in the nature of the office here claimed which should exempt usurpations of it from the mode of legal examination and trial provided by this act. See *People v. Van Slick*, 4 Cow. 323; *Com. v. Fowler*, 10 Mass. 295.

Other objections have been made to the mode of proceeding, but they do not appear to us well founded. It has been objected that it does not appear that this information was filed by leave of the court. Without admitting that it is necessary that this fact shall appear affirmatively, we hold, that in this case, the explicit sanction by the court of the information of the solicitor, as declared of record, shows that it was filed with the leave of the court.

It has been objected that the full title of the solicitor of the state is not set forth in the information, but he is termed "Solicitor" only. The court knows judicially who is the solicitor for the state in that circuit; and we presume it had no difficulty, and we can have none, in understanding that it was in this official character the information was filed. If there be anything in the objection, it is formal only and cannot avail the respondent on a demurrer to his plea.

We see no sufficient cause to disapprove the judgment from which the respondent has appealed to this court. This opinion must be certified to the superior court of Rowan, that the said court may proceed in the matter before it accordingly.

Per curiam. Judgment affirmed.

STATE EX REL. BROWN v. MCMILLAN.

1891. SUPREME COURT OF MISSOURI. 108 Mo. 153.

GANTT, P. J. This is a proceeding upon information of the prosecuting attorney of Jackson County *ex officio* to test the right of respondents to exercise the powers and discharge the duties of members of the board of aldermen of the city of Westport, in Jackson County. * * *

I. We are met at the threshold with the technical objection that the prosecuting attorney is not permitted by the laws of this state to

prosecute a writ of *quo warranto* "without the intervention of some third person as relator." This contention is more plausible than sound. By section 637, Revised Statutes 1889, it is provided, "the prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or the state may be concerned." That the state is interested in preventing any person usurping or intruding himself into an office created by its laws, is now firmly settled. This is a proceeding by the prosecuting attorney *ex officio*. It has been ruled uniformly since *State v. Merry*, 3 Mo. 278, that the writ of *quo warranto* is a writ of right and the attorney general need not ask leave to file his information.

In *State ex rel. v. Rose*, 84 Mo. 198, the precise point raised by the demurrer here was made, and it was ruled that "informations by the attorney general or prosecuting attorney *ex officio* may be filed without leave, as a matter of course." This court has never been disposed to deny the state the right to inquire, through her properly constituted officers, into the right of any person to one of its public offices. It is conceded by respondents that this court has often entertained and determined like proceedings, brought and prosecuted, in which the prosecuting attorney was the sole relator. This is certainly true, and it does seem to us that it is peculiarly appropriate that the prosecuting attorney should represent the state in such cases, and we see no reason for departing from this well established practice. *State ex rel. v. Frazier*, 98 Mo. 426. * * *

Demurrer of respondents overruled.

The state or people as plaintiff. In the absence of statute changing the form of action, it appears to be the uniform rule in this country that the proceedings in *quo warranto* must be instituted in the name of the sovereign, the people or state, or some officer representing them, and a private citizen will not be permitted to file the information in his own name; this, although the remedy is now universally regarded as civil in substance though criminal in form. See *Lowther's Case*, *Ld. Raym.* 1409; *Territory v. Lockwood*, 3 Wall. (U. S.) 236; *Cheshire v. People*, 116 Ill. 493; *Churchill v. Walker*, 68 Ga. 681; *State v. Union Inv. Co.*, 7 S. Dak. 51; *Commonwealth v. Lexington, etc., Co.*, 6 B. Mon. (Ky.) 397; *Bartlett v. State*, 13 Kan. 99; *Saunders v. Gatling*, 81 N. Car. 298; *State v. Stein*, 13 Neb. 529; *Rice v. National Bank*, 126 Mass. 300; *People v. Curtis*, 1 Idaho, 753; *Lindsey v. Attorney-General*, 33 Miss. 508; *United States v. Lockwood*, 1 Pinney (Wis.) 359; *Murphy v. Farmers' Bank*, 20 Pa. St. 415; *State v. Paterson, etc., Co.*, 1 Zab. (N. J.) 9; *State v. Schnierle*, 5 Rich. L. (S. Car.) 299; *State v. Gleason*, 12 Fla. 190; *Babcock v. Hanselman*, 56 Mich. 27; *State v. McMillan*, 108 Mo. 153; *Demarest v. Wickham*, 63 N. Y. 320; *Commonwealth v. Union, etc., Ins. Co.*, 5 Mass. 230; *Scott v. Clark*, 1 Iowa, 70; *Wright v. Allen*, 2 Tex. 158; *State v. Equitable, etc., Co.*, 142 Mo. 325.

Under the statutes in many of the states, permitting "any person or persons desiring to prosecute the same" to file an information in *quo warranto*, the suit often narrows itself *de facto* into a contest between two citizens; especially is this so where the right to a public office is the object of the proceeding. Under such statutes, the discretion of the court is characteristic of the nature of the writ as an extraordinary remedy, since, unless the relator is able to show some definite interest in the subject matter of the suit, the writ will usually be refused. But in some states permis-

sion will be granted a private citizen, where his interest appears of sufficient importance, to file the information without the consent or name of the state's attorney. *State v. Orvis*, 20 Wis. 235; *Camman v. Bridgewater, etc., Co.*, 12 N. J. L. 84.

2. Private citizen as relator.

COMMONWEALTH EX REL. McLAUGHLIN v. CLULEY.

1867. SUPREME COURT OF PENNSYLVANIA. 56 Pa. St. 270.

THIS was a rule in the supreme court, No. 147, to October and November Term, 1867, on the suggestion of J. Y. McLaughlin, to show cause why a *quo warranto* should not issue against Samuel B. Cluley, to answer by what warrant he held and exercised the office of sheriff of Allegheny county.

The suggestion set out that at the general election, October 9, 1866, Cluley received 19,915 votes for the office of sheriff, and McLaughlin received 12,925 votes for the same office; that Cluley was commissioned on the 12th day of November, 1866, notwithstanding he had been commissioned for the same office on the 28th of August, 1863, and had discharged its duties until the first Monday of December, 1863, and could not lawfully be commissioned as sheriff of the same county twice in six years; that being in violation of article 6, section 1, of the constitution of Pennsylvania.

The opinion of the court was delivered by

STRONG, J. A writ of *quo warranto* is not a writ of right. Even our act of assembly of June 14th, 1836, recognizes this. It enacts that such writ may be issued by the Supreme Court in all cases in which the writ of *quo warranto* at common law may have been issued, and in which the said court had, before the passage of the act, possessed the power of granting informations in the nature of said writ. The British statute of 9th Anne, ch. 20, was not, at first, adopted in this state. It was not reported in force by the judges; but its provisions were incorporated into our revised code. Under the British statute it was always held to be within the discretion of the court whether to grant or withhold an information in the nature of a *quo warranto*, and the court acknowledged themselves bound to exercise a sound discretion upon a consideration of the circumstances of each particular case. This was said by Lord Mansfield in *Rex v. Wardroper*, 4 Burr. 1964, and the same rule was recognized in *Rex v. Dawes*, 4 Burr. 2022, and in *Rex v. Sarjeant*, 5 Term. Rep. 467, and there are cases in which the courts have refused leave to file an information at the suggestion of a private relator, even when a valid objection to the defendant's title has been shown; *Rex v. Parry*, 6 Ad. & El. 810, 2 N. & P. 414. Nor has this court since the

act of 1836, adopted any other rule. In *Commonwealth v. Jones*, 12 Penn. St. Rep. 365, the British Practice was recognized as the rule with us, and though it has since been decided that it is not indispensable, a rule to show cause should be obtained before the writ can issue, no decision has been made that this court is bound to entertain such writ, if in their opinion it is improvidently issued. *The issue of the writ does not end the discretion of the court.*

Before the act of 1836, informations in the nature of *quo warranto*, at the instance of a private relator, were always required to be by leave of the court, and leave was not granted except upon the application of a competent relator. No one was held competent who had not a sufficient interest to warrant his interference, and our statute has made no change in this particular. Its second section gives to courts of common pleas concurrent jurisdiction with the supreme court in five classes of cases. The first three relate to municipal and other corporate offices, and the act provided that in any such case the writ might be issued upon the suggestion of the attorney general or his deputy in the respective county, or of any person or persons desiring to prosecute the same. The other two classes relate to usurpations of corporate rights, or forfeiture of corporate privileges. As the act was reported by the commissioners to revise the civil code, it was drawn so as to provide that writs in such cases should be granted only upon the suggestion of the attorney general or his deputy. The legislature, however, altered the provision, and enacted that writs in these cases, as in others might be issued upon the suggestion of any person or persons desiring to prosecute the same. But the statute of 9th Anne allowed informations at the relation of any person desiring to sue or prosecute them, and under that statute the rule was, that a private relator must have an interest. Our act, which substantially incorporates the provisions of the British statute, has received the same construction. *The court has construed the words "any person or persons desiring to prosecute the same" to mean any person who has an interest to be affected.* They do not give a private relator the writ in a case of public right, involving no individual grievance. This was ruled in the *Com. v. The Allegheny Bridge Co.*, 8 Harris 185, in *Murphy v. Farmers' Bank*, *id.* 415, and *Com. v. R. R. Co.*, *id.* 518. And it is to be observed that the legislature has placed all the five classes of cases enumerated in the act on the same footing in this particular. If a private relator cannot sue out a writ to enforce a forfeiture without having an interest, the statute gives him no greater right when he complains of usurpation of a county or township office. The right of the relator in each class of cases is defined by the same words.

The relator in the present case suggests that Samuel B. Cluley now usurps, intrudes into and unlawfully holds the office of high sheriff of Allegheny county; that at the general election on the 9th day of October, 1866, an election was held for the sheriff of said

county, that at the election the said Cluley received nineteen thousand nine hundred and fifteen votes, and the relator received twelve thousand nine hundred and twenty-five votes for the said office; that the vote was certified to the governor, and that Cluley was commissioned sheriff, and that he has since acted as such notwithstanding the fact that he was commissioned sheriff of the said county on the twenty-eighth of August, 1863, and discharged the duties of the office from that time until the first Monday of December, 1863.

Now on this showing, what interest has the relator in the question he attempts to raise? What more than any inhabitant of Allegheny county, or of the Commonwealth? He was a rival candidate for the office at the election, but he was defeated with a majority against him of six thousand nine hundred and ninety. Doubtless if his successful rival is incapable of holding the office on account of the constitutional provision "that no person shall be twice chosen or appointed sheriff in any term of six years", or for any other reason, and that incapacity entitles him, the relator, to the office, he has an interest. He certainly can have none if a judgment of ouster against Cluley would not give the sheriffalty to him. But surely it cannot be maintained that in any possible contingency the office can be given to him. *The votes cast at an election for a person who is disqualified from holding an office are not nullities.* They cannot be rejected by the inspectors, or thrown out of the count by the return judges. The disqualified person is a person still, and every vote thrown for him is formal. Even in England it has been held that votes for a disqualified person are not lost or thrown away so as to justify the presiding officers in returning as elected another candidate having a less number of votes, and if they do so, a *quo warranto* information will be granted, against the person so declared to be elected, on his accepting the office. See Cole on *Quo Warranto* Informations, 141-2; Regina v. Hiorns, 7 Ad. & E. 960; 3 Nev. & Perry 184; Rex v. Bridge, 1 M. & S. 76. Under institutions such as ours are, there is even greater reason for holding that a minority candidate is not entitled to the office if he who received the greatest number of votes is disqualified. We are not informed that there has been any decisions strictly judicial upon the subject but in our legislative bodies the question has been determined. It was determined against a minority candidate in the legislature of Kentucky, in a case in which Mr. Clay made an elaborate report, and was sustained. In 1793, Albert Gallatin, elected a senator from this state, was declared by the Senate of the United States disqualified because he had not been a citizen of the United States nine years and his election was declared void for that reason, but the seat was not given to his competitor. Nobody supposed the minority candidate was elected. There have been several other cases of contested elections in which the successful candidates were decided to have been disqualified, and denied their offices. John Bailey's case is one of them. He was elected to

Congress from Massachusetts, and refused his seat in 1824. But neither in his case, or any other with which we are acquainted, were the votes given to the successful candidate treated as nullities, so as to entitle one who had received a less number of votes to the office. There is a class of cases in England apparently, but not really, asserting otherwise. The earliest of them are referred to by Mr. Buller in his argument in *Rex v. Munday*, Cowper 530. They were followed by *Rex v. Hawkins*, 10 East 211, and *Rex v. Parry*, 14 *id.* 549. In these cases it is said that if sufficient notice is given of a candidate's disqualification, and notice that votes given for him will be thrown away, votes subsequently cast for him are lost, and another candidate may be returned as elected if he has a majority of good votes after those so lost are deducted. There is more reason for this in England where the vote is *viva voce*, and the elective franchise belongs but to few, than here, where the vote is by ballot, and the franchise well nigh universal.* In those cases the notice was brought home to almost every voter, and the number of electors was never greater than three hundred and generally not more than two dozen. Besides a man who votes for a person with knowledge that the person is incompetent to hold the office, and that his vote therefore cannot be effective, that it will be thrown away, may very properly be considered as intending to vote a blank or throw away his vote.

But the present relator suggests no such case. He does not even aver that, if the votes given for Cluley were thrown out, he received a majority, though doubtless such was the truth. He has therefore exhibited no such interest as entitled him to be heard.

On the argument we were told that in *Rex v. Godwin*, Douglass 387 (396), it was held that the rival candidate was the most proper relator. An examination of the case, however, shows this to be a mistake. The rival candidate was the relator, but he received a majority of the votes. Doubtless in England, when the information is against a burgess or alderman of a borough, a corporator is held a fit relator. He has an interest. Our case of *Commonwealth v. Small*, 2 Casey 31, cited in support of the suggestion, instead of being any real support, is adverse to it. The relator was, it is true, a rival candidate, but his suggestion was not supported for that reason, but because there had been a subsequent election at which he had been elected. The court put the right to intervene expressly upon the ground of that subsequent election. Said Lowrie, J., "The relator shows sufficient evidence of title in himself to authorize him to institute this proceeding. He acquired it at a subsequent election, and if that is not contested on any other grounds than the supposed validity of the prior election, then, of course, he is entitled to the office." The plain inference from this is, that had it not been for the second election, he would have been an incompetent relator.

It need only be said that in regard to the act of April 13, 1840,

that the relator referred to in it is a person entitled to the office if judgment be given against the party in possession.

After what has been said, it will be seen that we are of the opinion J. Y. McLaughlin has no such interest as entitles him to be heard in a writ of *quo warranto*. The question which he seeks to raise is a public one exclusively, and it can be raised only at the instance of the attorney general.

The writ of *Quo Warranto* is denied.

In accord.—State v. Matthews, 44 W. Va. 372; Commonwealth v. McCarter, 98 Pa. St. 607, 614; *Contra*. Londoner v. People, 15 Colo. 557; Crovatt v. Mason, 101 Ga. 246.

That any citizen or taxpayer has sufficient interest to enable him to maintain proceedings to oust the unlawful incumbent of a municipal office, see Hinckley v. Breen, 55 Conn. 119; State v. Jenkins, 25 Mo. App. 484; Davis v. City Council, etc., 90 Ga. 817; Londoner v. People, 15 Colo. 557; State v. Hammer, 42 N. J. L. 435; *Contra*. Miller v. Town of Palermo, 12 Kan. 14; State v. Matthews, 44 W. Va. 372; Voisin v. Leche, 23 La. Ann. 25; State v. Stein, 13 Neb. 529; Barnum v. Gilman, 27 Minn. 466.

PEOPLE EX REL. JONES v. NORTH CHICAGO RAILWAY COMPANY.

1878. SUPREME COURT OF ILLINOIS. 88 Ill. 537.

APPEAL from the Criminal Court of Cook County; the Honorable WILLIAM W. FARWELL, Judge, presiding:

The record shows that at the August Term, 1875, of the Criminal Court of Cook County, the following motion was presented to the court:—

“And now on this day comes Charles H. Read, the State’s attorney for said county of Cook, and at the instance of Judson W. M. Jones, as relator, presents to the court the annexed petition of the said Judson W. M. Jones, for leave to file an information in the nature of a *quo warranto*, in the name of the people of the state of Illinois, against the North Chicago Railway Co. * * *”

The petition is as follows, omitting the caption:

“Your petitioner, Judson W. M. Jones, respectfully represents that the North Chicago Railway Company, is a corporation created and existing by virtue of an act of the legislature of the state of Illinois, approved Feb. 14, 1859, entitled ‘an act to promote the construction of horse railways in the city of Chicago’; that some years ago the said company constructed, and has ever since maintained, and still maintains, a street railway in the town of Lake View, in the county of Cook, and has for some time been and now is, operating the same, from the northern limits of the city of Chicago, upon and

along the following streets of the said town of Lake View, in the county of Cook, towit:—from such northern limits of the city of Chicago, upon and along North Clark Street, by horse power, to Diversey Street, at its intersection with the Evanston Road, thence northerly by steam power, upon and along said Evanston Road, to Graceland Avenue, and thence west on Graceland Avenue, by steam power to Graceland cemetery; that as your petitioner is informed and believes, the only warrant or authority which said company has or claims to have for the construction, maintenance and operation of such street railway within said town of Lake View, in the manner aforesaid, is the aforesaid act of the legislature of said state of Illinois, one section of which action purports to authorize said company to extend its road to any point in Cook county.

“Your petitioner is advised and believes, that so much of your act as authorizes said company to extend its railway beyond the corporate limits of the City of Chicago is unconstitutional and void, being contrary to that provision of that clause of section 23, of article 3, of the Illinois State Constitution of 1848, which provides that no private or local law which might be passed by the general assembly shall embrace more than one subject, and that shall be expressed in the title.

“Your petitioner is also advised and believes, that for the same reason, the said act does not confer upon the said company the power to use steam as a means of operating its railway, even over such territory as it can rightfully maintain its track upon. Your petitioner represents that he is an inhabitant of the said town of Lake View, and an owner of real estate therein, contiguous to one of the streets upon which said company is operating its steam railway, and that your petitioner is desirous that leave may be given to the state’s attorney for the said county of Cook and state of Illinois, on behalf and in the name of the people thereof, to file an information in the nature of a *quo warranto*, and upon the relation of your petitioner, and against the said the North Chicago Railway Company, to make it answer to the said people by what warrant it claims to hold, execute, and exercise, the liberties, privileges, functions, powers and franchises aforesaid.

JUDSON W. M. JONES.”

Verified before a notary public.

(At the same time an affidavit of the president of said respondent company was filed and presented to the court in opposition to the motion. It denied the allegations of the petition and charged that the relator herein was prosecuting this proceeding for private and personal needs and ends.) * * *

* * * The court refused to allow leave to file the information and the record is brought here by the appeal of Judson W. M. Jones.

The only question is, did the court err in refusing leave to file the information?

MR. CHIEF JUSTICE SCHOFIELD delivered the opinion of the court.

Did the court err in refusing to allow the relator to file the information?

The ruling of this court, is, the granting of leave to file an information in the nature of a *quo warranto*, is in the sound discretion of the court or judge to whom the application is made. Leave on the one hand, is not granted as a matter of right upon the part of the relator; and on the other hand, a court is not at liberty to arbitrarily refuse, but must exercise a sound discretion according to the principles of law. The People *ex rel.* v. Waite, 70 Ill. 25; The People *ex rel.* v. Callaghan, 83 *id.* 128.

It is here shown that Jones is an inhabitant of the town in which the road is being operated, and the owner of real estate therein; but it is not shown that he is, either specially as an individual or in common with all the other citizens of the town, injured by the construction and operation of the road. The opposing affidavit is properly to be taken into consideration in determining whether the writ should have been issued (the People *ex rel.* v. Waite, *supra*), and it distinctly rebuts all inference that might arise from the mere conceded fact of the construction and operation of the road, of either private or public injury, and shows also that the road was constructed long before Jones became the owner of his present property in the town; that it was constructed and has since been operated "at the earnest solicitation of inhabitants of the town,—owners of property abutting upon the road and streets occupied;" that "no objection has ever been made to the operation of the railway so far as the officers of the company know, except as made" by Jones, and that it is the almost universal desire of the inhabitants of the town and those who travel on the railway that it should be operated by steam.

Where a corporation, by the exercise of powers not conferred by its charter, does no private injury, and commits an offense against the public alone, the state may punish or waive the right to do so, as in the judgment of those entrusted with the appropriate power in that respect may be deemed most in consonance with the public interest. If a wrong is done by an abuse of the franchise, it is a public wrong, and a proceeding by quo warranto must be by the public prosecutor or other authorized agent of the state; and a private citizen cannot, in such case, have the aid of this extraordinary remedy. High on Extraordinary Legal Remedies, § 654, and cases there cited; Angell & Ames on Corporations, § 736; Murphy v. Farmers' Bank, 20 Pa. St. 415. And it is also said (High on Extraordinary Legal Remedies, *supra*), "An exception, however, is recognized in cases affecting only private or individual rights, and which merely affect the administration of the corporate functions, without affecting the existence of the corporation, and in such cases it is held that the courts may interpose on a proper showing." But, since Jones has

sustained no special injury affecting his private or individual rights, this principle is not involved in the case.

It is, however, contended that Jones is entitled to file the information, whatever may have been his rights at common law, by virtue of the provision of § 1, chapter 112, Rev. Stats. 1874, p. 787.

That section says: "The attorney general or state's attorney of the proper county, either of his own accord or at the instance of an individual relator, may present a petition to any court of record of competent jurisdiction, or any judge thereof in vacation, for leave to file an information in the nature of a *quo warranto*, in the name of the people of the state of Illinois; and if such judge or court shall be satisfied that there is probable ground for the proceeding, the court or judge may grant the petition and order the information to be filed."

There is nothing here that authorizes any one other than the attorney general or state's attorney to present a petition for leave to file an information. This, he may do either of his own accord or at the instance of any individual relator, but the language does not profess to obliterate the well recognized distinction between informations in behalf of the public to enforce public rights, and those in behalf of individuals to enforce private rights. Nor does it assume to place the control of informations to enforce public rights in every individual who may choose to intermeddle.

The attorney general or state's attorney, if the information affects public rights only, may undoubtedly act at the instance of any individual who may furnish him the requisite proofs to authorize him to act, whom he may name relator, *but he must act in his official capacity under a sense of official duty*, and not merely lend his name for the use of a private party; and the proceeding must be official in fact, and not simply official in form but private in fact.

In all matters in which the public alone is concerned, the law has wisely placed the control of legal proceedings in its officers selected for that purpose, and it is never admissible that these proceedings shall be allowed to be used as mere instruments for the gratification of private malice, or the attainment of personal and selfish ends.

The petition here presented is not the petition of the attorney general or states' attorney, but of Jones, and it is Jones only, not the attorney general or state's attorney, that prays that leave may be given to file an information. True, it appears the state's attorney presented the petition of Jones, and made the motion, but it is quite evident this was merely formal.

The appeal is prayed and prosecuted by Jones, and no complaint is made by the attorney general or state's attorney of the refusal of the court below to give leave to file the information; but errors are assigned and argued by the private counsel of Jones alone.

The court below, in the exercise of its discretion, was authorized

to take into consideration the circumstances showing the character of the proceeding, and if satisfied, as we think it was justified in being, that the purpose was merely to allow a private party to institute proceedings in a matter concerning the public alone, it was not only within its discretion, but likewise its duty to allow the information to be filed.

Finding no evidence in the record of abuse of discretion, the judgment is affirmed.

Judgment affirmed.

See also *Cheshire v. People*, 116 Ill. 493; *State v. Tracy*, 48 Minn. 497; *People v. Pratt*, 15 Mich. 184; *Commonwealth v. Dillon*, 81½ Pa. St. 41; *Haupt v. Rogers*, 170 Mass. 71; *Eaton v. State*, 7 Blackf. (Ind.) 65; *State v. Bradford*, 32 Vt. 50; *Hargrove v. Hunt*, 73 N. Car. 24.

Where the object of the information is not to correct a violated right of relator but simply to vindicate the rights of the state, the relator is treated merely as a prosecuting witness and the state's attorney may dismiss the proceedings even in the face of relator's objection. *State v. Douglas Co., etc.*, 10 Ore. 198; *Attorney-General v. Barstow*, 4 Wis. 567.

And in such cases a relator is not only unnecessary, but his name may be omitted altogether. *Cheshire v. People*, 116 Ill. 493; *Bartlett v. State*, 13 Kan. 99; *State v. Milwaukee, etc.*, R. Co., 45 Wis. 579, 595; *State v. Rose*, 84 Mo. 198; *Commonwealth v. Fowler*, 10 Mass. 290, 295; *Taggart v. James*, 73 Mich. 234; *Mathews v. State*, 82 Tex. 577.

See in general as to degree of interest which must be exhibited by relator. *State v. Matthews*, 44 W. Va. 372; *People v. Miller*, 16 Mich. 56; *Little v. State*, 75 Tex. 616; *People v. Londoner*, 13 Colo. 303; *State v. Mason*, 14 La. Ann. 505; *State v. Mote*, 48 Neb. 683; *State v. Hall*, 111 N. Car. 369; *State v. Hammer*, 42 N. J. L. 435; *Yonkey v. State*, 27 Ind. 236; *Andrews v. State*, 69 Miss. 740.

STATE EX REL. STEELMAN ET AL. V. VICKERS.

1889. SUPREME COURT OF NEW JERSEY. 51 N. J. L. 180; 17 Atl. 153.

BEASLEY, C. J. This is an information in the nature of a *quo warranto*, in the name of the attorney general, at the instance of private relators. The object of the procedure is to test the legal right of the defendant to the office of common councilman of the municipality called in the pleadings "The Mayor and Council of the Borough of Somers Point." The information shows that this borough is a *de facto* corporation; that in the year 1886, it was organized by virtue of an act entitled "An act for the formation of borough governments in seaside resorts," approved March 29, 1878, and its supplements; and that in the following year the defendant was elected to the office now in question. As a ground for the ouster of the defendant, the relator then avers that the methods

pursued in the erection of this municipality did not conform to the statutory standard in various specified particulars, and that the act itself authorizing the creation of these local governments is unconstitutional. Consequently it will be perceived that the theory of the relator's case is that, inasmuch as there is no legal municipality in existence in this instance, there can be, *ex necessitate*, no such office as common councilman appurtenant to it; the inference, of course, being that the defendant is illegally arrogating such position.

It is manifest that this is an attempt to do indirectly what this court has declared cannot be done directly; that is, for a private relator to call in question the existence of one of these bodies that are public corporations at least *de facto*, if not *de jure*. Such an endeavor is obviously possessed of all that impolicy that forms the basis of the prohibition alluded to; for that basis was that it was highly inexpedient that these municipalities, being the depositories of a part of the governmental power of the state, should have their very being put at hazard whenever any member of the community saw fit to make the assault. *Being public institutions, it was determined that their existence was not to be challenged, except by the state, through its attorney general, he acting ex officio, as the representative of the public, and that in such a procedure his name could not be used pro forma by a private relator.* This being the rule and its reason, it is manifest that it would be absolutely preposterous to permit the corporate existence to be called in question by a private person, for the purpose of dismemberment; for, in depriving the municipality of its organs, you practically dissolve it. If this defendant is to be ousted from his office of common councilman on the ground that the corporation has no life, so for the same reason can his associates be removed from their posts; and the same fate would await all the other functionaries of the borough, and thus this local government would, for all useful purposes be at an end. In substance, therefore, the result of this indirect attack, at a private hand, would be the same as would be the direct attack, on the same ground upon the corporation, and the latter has always been declared by this court not permissible. It is proper to further remark that this circuitous assault upon the corporate existence has an additional objection to those inherent in an immediate assault, for in its processes the municipality is not brought into court, and therefore has no opportunity of defending its life. Our conclusion is that there is no legal ground laid for ousting the defendant from the office held by him, and consequently he is entitled to judgment on this demurrer.

See also *Rex v. Parry*, 6 A. & E. 810; *State v. McLaughlin*, 15 Kan. 228, 233; *State v. Tracy*, 48 Minn. 497; *Commonwealth v. Union, etc., Ins. Co.*, 5 Mass. 230; *State v. Brown*, 31 N. J. L. 355.

STATE v. DOUGLASS COUNTY ROAD COMPANY.

1881. SUPREME COURT OF OREGON. 10 Oregon, 198.

By the court, WALDO, J.—

The appellant, the Douglass County Road Company, is a private, as distinguished from a distinctly public, corporation, (Douglass County Road Company v. Abraham, 5 Or. 518.) Its object as specified in its articles of incorporation, was "to build and keep in repair, a good and substantial plank, clay and gravel wagon road through the big canyon, in Douglass County, State of Oregon, and to receive tolls for travelling over said road." The object of this action is to annul the existence of the corporation.

Section 351 of the code of civil procedure abolished the writ of *quo warranto* and the *quo warranto* information. But it is only the form of proceeding that is done away with by that section. The remedies formerly had under these forms are now had under the civil action specified in sections 353 and 354. (People v. Hall, 80 N. Y. 119.)

The action lies only for franchises exercised without or in violation of legislative grant, by which, in this country, all franchises are held. (The People v. The Utica Insurance Company, 15 Johns. 358; Bank of Augusta v. Earle, 13 Pet. 595; Ang. & Ames, on Cor. §§ 731, 737; United States v. Lockwood, 1 Pinney's Rep. (Wis.) 363; Territory v. Lockwood, 3 Wall. 236; Cole on Informations, III.)

In England the attorney general could file *quo warranto* and other informations at his discretion. But in practice, he seldom did so, except where the prerogatives of the crown were specially concerned. Where the interests of individuals were intermingled with those of the crown, the master of the crown office in King's Bench, was the usual officer to exhibit informations. In the exercise of this function, he stood in a relation to individuals similar to that of the attorney general to the crown. (Cole on Informations, 110; Goddard v. Smithett, 3 Gray 116.) But in 1693, the statute of 4 & 5 W. & M. c. 18, relating to trespasses and batteries, and other misdemeanors, was passed, for the purpose as Mr. Justice Wilmut says, in Rex v. Marsden, 3 Burr. 1817: "To prevent the master of the crown office from vexing and oppressing the subject, and intrusted this court with the power of inspecting the filing of informations, and seeing that he did not exercise his power to the oppression of the subject, or without sufficient ground and foundation; so that the act was made to check and control the power of the master of the crown office; not to give him a right to exercise a power which he never exercised before; quite the contrary." After this act, the master of the crown office could not file an information

without leave. This statute has been shown to govern *quo warranto* informations by the master of the crown office, the filing of which by that officer was not introduced but only regulated by the statute of 9 Anne. (Cole on Informations, 126.)

This act required the relator's name to be mentioned in the information, and this, and the previous act of W. & M., requiring the person at whose suggestion the suit had been instituted, to give an undertaking for costs, should prosecution fail, gave rise to the practice of filing *quo warranto* informations, entitled on the relation of private persons—the relator being altogether the creature of statute. (Ang. & Ames on Cor. § 733; Cole on Informations, 127.)

But an information against a corporation as a body, to annul its corporate existence, could not be filed by the master of the crown office. Such informations were filed by the attorney general; and leave was not required—he was the sole judge of the propriety of filing the information. The law requiring leave of the court before an information could be filed, applied only to the master of the crown office. Rex v. Carmathen, 2 Burr. 869; Murphy v. Farmers' Bank, 20 Pa. St. 415; Commonwealth v. Turnpike Co., 6 B. Monroe 397.)

With us, the filing of *quo warranto* information, the several district attorneys possess the powers as well as those usually exercised by the attorney general, as by the master of the crown office; but the statute preserves, with few exceptions, the distinctions between actions by them, acting *ex officio* in the former capacity, and *ex relatione* in the latter. (Attorney General v. Railroad Company, 9 Vroom, 282; The State v. Stewart, 32 Mo. 379.)

Our statute limits the power of the district attorney, acting *ex officio*, in requiring him to get leave. *But when leave has been granted, the discretionary power of the court has been expended.* (The State v. Brown, 5 R. I. 6.)

The district attorney is the law officer of the state, within the limits of his district, with the powers, in the absence of statutory regulation, of the attorney general at common law. (Constitution of Oregon, art. 7, sec. 17.) *Therefore, when, as in the case before us, the district attorney files a quo warranto information, in a distinctly state action, he has as much the sole control over it as the attorney general would have in a like case at common law. A relator cannot be a party to the proceeding—is a mere stranger—and if his name is put in the information, it is surplusage.* (Rex v. Williams, 1 Burr. 408; The People v. The Trustees of Geneva College, 5 Wen. 219.)

The reason is plain; the state, out of its sovereign power, has created the corporation for the purposes declared in its charter, and the same power must preside at its dissolution. The state may waive the forfeiture of the charter, and its power to do so, acting

through its attorney general, cannot be controlled by the court. (State v. McConnell, 3 Lea. (Tenn.) 339; Commonwealth v. Union Insurance Company, 5 Mass. 232; The People v. Attorney General, 22 Barb. 117; The People v. Tobacco Company, 42 How. Pr. 162; The People v. Fairchild, 8 Hun. 334; s. c. 67 N. Y. 334.)

In accord.—Cole v. Dyer, 29 Ga. 434; Kenney v. Consumers' Gas Co., 142 Mass. 417; Richman v. Adams, 59 N. J. L. 289; Commonwealth v. Allegheny Bridge Co., 20 Pa. St. 185; State v. West Wisconsin R. Co., 34 Wis. 197, 208; People v. Colorado, etc., R. Co., 8 Colo. App. 301; Houston v. Neuse River, etc., Co., 53 N. Car. 477.

3. Respondents—Public corporations.

STATE V. VILLAGE OF BRADFORD ET AL.

1859. SUPREME COURT OF VERMONT. 32 Vt. 51. *Supra.* p. 308.

STATE v. BOARD OF COMMISSIONERS OF ATLANTIC HIGHLANDS.

1888. SUPREME COURT OF NEW JERSEY. 50 N. J. L. 457; 14 Atl. 560.

DEMURRER to an information in the nature of a *quo warranto*.

BEASLEY, C. J.—An information in the nature of a *quo warranto* was filed by the attorney general against the Board of Commissioners of Borough Commission of Atlantic Highlands, for the purpose of testing the right of such body to exercise the franchises of a municipal corporation. The information shows that certain persons took steps to erect a portion of the village of Atlantic Highlands into a corporate borough by the force of the act of the legislature approved March 7, 1882. This statement is followed by a specification of the errors committed in this formative procedure, whereby it is claimed that it became abortive and void. The principal ground relied upon to support the demurrer was that the writ has not gone against the proper party; it being insisted that the alleged usurping corporation could not be made a party, as, if the information set forth the truth, there was and is no such corporate body. But this exception is hypercritical. The information shows a *de facto* corporation, and it is not perceived how its right to exist and use the powers it is exercising can otherwise than has been done in this case be put to the test. The writ could not go

against any of the municipal officers, on the ground that they have not been duly elected, or on any other account, have no right to their positions, because it has been decided already, by the courts, that in such a proceeding the right of the municipality to exist as a corporate body cannot be thus collaterally called into question. The corporation, as at present organized, is the organ, by which the community, by common consent, is represented, and it is the community that is concerned in this procedure, and not any particular official or other class of citizens. As the body of the people cannot be made parties as individuals, it would seem a necessity to treat the *de facto* ruling body, established by themselves, as their legal representative. The cases with respect to informations against municipalities do not appear to settle definitely the course to be pursued; but we think the method adopted in the present instance, as far as regards the question as to parties to the procedure, is the proper one. This was the course pursued in the case of the State v. Village of Bradford, 32 Vt. 50, in which case the corporate body was one of the defendants, and a judgment was rendered dissolving such *de facto* corporation. High, Ex. Leg. Rem. § 684. Let the demurrer be overruled.

The other points argued have been examined, but we think none of them have any weight.

See also *Rex v. Amery*, 2 Term R. 515, 566; *People v. City of Riverside*, 66 Cal. 288; *State v. Tracy*, 48 Minn. 497; *State v. North*, 42 Conn. 79; *People v. Clark*, 70 N. Y. 518.

PEOPLE EX REL. WEBBER ET AL. v. CITY OF SPRING VALLEY ET AL.

1889. SUPREME COURT OF ILLINOIS. 129 Ill. 169; 21 N. E. 843.

(INFORMATION in *quo warranto* against the city of Spring Valley and C. J. Devlin as mayor of said city, charging the usurpation of municipal franchises. Respondents demurred and upon being overruled filed pleas to the information. The state thereupon filed a replication and respondents again demurred. The Supreme Court, through Magruder, J., after holding that the demurrers to the replication were properly sustained, continued.)

MAGRUDER, J.—* * * In substance therefore, all the replications attacked the existence of the city of Spring Valley as a corporation. But this was a departure from the information, or, if not a technical departure in pleading, it amounted to a contradiction of the information by the replication, because the information by making the city of Spring Valley a party defendant, thereby admitted its existence

as a corporation. *When an existing corporation abuses any of its franchises, or usurps franchises which do not belong to it, the information should be against the corporation as such. But when a body of men or number of individuals unlawfully assume to be a corporation, the information should be against them as individuals, and not by their corporate name.* Dillon, in his work on Municipal Corporations, (Volume 2, 3d ed. § 895), says: "It is held in England that, if the information be for usurping a franchise by a corporation, it should be against the corporation; but, if for usurping the franchise to be a corporation, it should be against the particular persons guilty of the usurpation." *People v. Richardson*, 4 Cow. 97; *People v. Railroad Company*, 15 Wend. 113; *People v. Supervisors*, 41 Mich. 647, 2 N. W. 904; *State v. Coke Co.* 18 O. St. 262.

The weight of authority in this country "may now be regarded as sustaining the proposition that the effect of filing an information against a corporation by its corporate name, to procure a forfeiture of its charter, or to compel it to disclose by what authority it exercises its corporate franchises, *is to admit the existence of the corporation.* When therefore, the information is filed against the respondent, in its corporate name, and process is issued and served accordingly, and the respondent appears, and pleads in the same corporate character, its corporate existence cannot afterwards be controverted." High, Ex. Rem. (2d. ed. § 61); *State v. Bank*, 33 Miss. 474; *People v. Railroad Co.*, *supra*; *State v. Coke Co.*, *supra*. If in the present case, the information had charged the city of Spring Valley with exercising a franchise not authorized by its charter, it would have been proper to make the city a party defendant by its corporate name. But, as the information calls in question the corporate existence of the city, it should have been brought against the officials or individuals assuming to exercise the corporate powers. Some of the authorities seem to draw a distinction between private corporations and municipal corporations, and to hold that an information may be brought against a municipal corporation by its corporate name, even where its corporate existence is challenged, the proceeding in such case being against the city as a corporation *de facto*, and not as a corporation *de jure*. *State v. Bradford*, 32 Vt. 50; *People v. City of Riverside*, 66 Cal. 288, 5 Pac. 350. We do not think however, that an exception to the general rule can be held to exist in this state in the case of municipal corporations.

In the city of Chicago *v. People*, 80 Ill. 496, the proceeding was an information in the nature of *quo warranto* against the city of Chicago, requiring it to show by what authority it exercised the franchises conferred by the city incorporation act of 1872, the charge being that the question of minority representation was not submitted at the election to determine the question of incorpora-

tion, and that such election was invalid for fraud and other irregularities. The right to bring the information against the city of Chicago *eo nomine* was not discussed. On the contrary, it is there said: "It has not been necessary to decide whether this proceeding will lie against a municipal corporation as a body." It must be remembered also that, in that case, the question was whether the city of Chicago had organized under the incorporation act of 1872 by legally adopting that act as its charter. The city of Chicago existed under another charter prior to the election upon the question of becoming incorporated under the act of 1872. If that election had been against incorporation, that city would still have existed under its old charter. Therefore the party defendant to the *quo warranto* proceeding was a city already existing, and not one deriving its sole existence from the election under discussion in that case. Here, however, the city of Spring Valley, had no corporate being prior to its incorporation, or attempted incorporation, under the act of 1872. When it was made defendant to the information its existence as a corporation under that act was admitted. In *Cheshire v. People*, 116 Ill. 493, 6 N. E. 486, the information was against certain persons assuming to act as directors of a school district. The defendants demurred to the information, and upon the demurrer being overruled, they elected to stand by the information. One of the objections to the information was that the school district was not made a party. It was there held that, as the information proceeded upon the hypothesis, that there was no corporation in law by the name of "School District No. 9" it would have been impossible to make the corporation a party and that the persons assuming to act as directors of the district were "the only parties that need be before the court to test the validity of the organization of the district."

Moreover the statute of this state in relation to *quo warranto* (Starr & C. St. c. 112, p. 1871), provides that the information may be filed where "any association or number of persons shall act within this state as a corporation without being legally incorporated." This language implies that, where the legal existence of the corporation itself is questioned, the proper defendants to the information are the persons who assumed to act as a corporation. The subsequent clauses indicate that the corporation itself is a proper defendant, when it does or omits any act which amounts to a surrender or forfeiture of its rights and privileges as a corporation, or exercises powers not conferred by law." It is claimed however that by dismissing the information the trial court carried the demurrers to the replications back to the information, and that this was erroneous because the defendants had demurred to the information, and their demurrers had been overruled. Unquestionably the general rule is that the court will

not, in carrying the demurrer back, sustain it to a pleading of the adverse party to which a demurrer thereto has already been overruled. *Culver v. Bank*, 64 Ill. 528. But, if the declaration is so defective as not to support the judgment, that may be availed of by a motion to arrest, or on error, even after a demurrer thereto has been overruled, and the defendant has pleaded over. *Kipp v. Lichtenstein*, 79 Ill. 358; *Stearns v. Cope*, 109 Ill. 340. In the present case the declaration is so defective that it could not support the judgment. The judgment would be one of ouster against the corporation for not having been legally organized. But the declaration admits that it was legally organized. The judgment would be inconsistent with and contradictory of the declaration. It would be based upon the non-existence of a corporation, whose existence the declaration admits. In *State v. Coke Co.*, *supra*, the pleadings were substantially the same as in the present case. The information was against the gas company as a corporation. A replication of the state to one of the pleas of the defendant, in substance, denied the existence of the corporation. The company demurred to the replication and the demurrer was sustained. In that case the court say: "It is claimed by the counsel for the defendant that this replication is a departure in pleading; that the information having been filed and process issued against the defendant by its corporate name and not against individuals for the usurpation of the franchise to be a corporation, the fact that the defendant has or once had a legal existence as a corporation is admitted and cannot therefore be drawn in question by the state in its subsequent pleadings in the case. * * * In this country we think, the great weight of authority favors the ground taken by counsel for defendant. * * * We are aware of no case in this country in which a body sued as a corporation, has been ousted of the franchise to be a corporation, on the ground that it never had a legal corporate existence." Inasmuch, therefore, as any judgment which may have been entered in favor of the people under the pleadings in this record could have been arrested on motion or reversed on error, the court below properly carried the demurrers to the replications back to the information, and committed no error in dismissing the information. The latter would not support the judgment even if the pleas are defective for the reasons urged by counsel for the defendants. If the demurrers to the replications had been carried back to the pleas, and judgment had been rendered against the defendants upon the information, it would have been error not to sustain a motion in arrest of the judgment.

After the demurrers to the replication had been sustained, and defendants had moved for judgment on those demurrers, the people moved to amend the information by inserting after the words, "The City of Spring Valley," the words, "never having lawfully and legally been incorporated under the laws of the state of Illinois."

The trial court overruled the motion to amend, and its action in this regard is complained of as error. The city of Spring Valley as a corporation, would still have been a party defendant, notwithstanding the allegation that it was not legally incorporated. The information would have been inconsistent with itself in admitting the existence of the city and at the same time denying such existence. Hence the people suffered no injury from the refusal of leave to amend in the respect indicated.

Appellees have made a motion to dismiss this writ of error on account of want of jurisdiction of this court. The motion was reserved when the cause was taken. The right to exercise the municipal power and privileges, conferred by the legislature upon cities under the act for the incorporation of cities and villages, is a franchise of the highest character. Such right is directly involved in the issues made by the pleadings in this case. Therefore the writ of error has been properly sued out from this court directly to the circuit court. The motion to dismiss is accordingly denied. Upon more mature reflection we are satisfied that, where the right to hold a municipal office depends upon the legality of the incorporation of the municipality under the acts of the legislature, a franchise is involved in a *quo warranto* proceeding to test such right. In so far as the cases of the People v. Holtz, 92 Ill. 426, and Graham v. People, 104 Ill. 321, hold a contrary view they are overruled. The judgment of the circuit court is affirmed.

See in accord People v. City of Peoria, 166 Ill. 517, 522; State v. Fleming 158 Mo. 558; State v. Uridil, 37 Neb. 371; State v. Independent School Dist., 44 Iowa, 227; Ewing v. State, 81 Tex. 172; Territory v. Armstrong, 6 Dak. 226; State v. Simkins, 77 Iowa, 676; State v. Hall, 111 N. Car. 369.

4. Respondents—Private Corporations.

STATE EX REL. ATTORNEY GENERAL v. CINCINNATI GAS LIGHT & COKE COMPANY.

1868. SUPREME COURT OF OHIO. 18 O. St. 262.

(INFORMATION in the nature of *quo warranto* filed by the attorney general against respondent in its corporate name, charging the usurpation of corporate franchise. Respondent pleaded its corporate capacity, setting forth its charter. The state then, by replication, denied respondent's corporate existence and respondent demurred.)

SCOTT, J.—This case came before us at the last term of this court upon demurrer to the third and fourth pleas filed herein by the

defendant. That demurrer was sustained as to both the pleas, and at the present term the defendant has filed a fifth plea, and various issues at law have been raised by the demurrers of the respective parties to further pleadings in the case, all which are now submitted for our determination.

We shall consider the questions arising upon the several demurrers in the order in which they are raised by the pleadings.

The first replication of the attorney general on behalf of the state, to the first and second pleas of the defendant, is that "neither the Cincinnati Gas-Light & Coke Company nor the persons acting under such name and style, are the persons named in said act of the general assembly, nor their associates, nor the successors of such persons, or their associates," with a conclusion to the country.

To this replication there is a general demurrer by the defendant.

It is claimed by counsel for the defendant that this replication is a departure in pleading; that the information having been filed and process issued against the defendant by its corporate name, and not against individuals, as usurpers of the franchise to be a corporation, the fact that the defendant has, or once had a legal existence as a corporation is admitted, and cannot therefore be drawn in question by the state, in its subsequent pleadings in the case.

On the other hand, it is argued by counsel for the state, that an information in the nature of *quo warranto* will lie on the relation of the attorney general against a *de facto* corporation, in its assumed corporate name, to compel it to show by what title it exercises the franchise to be a corporation.

This proceeding is instituted under the authority given by the act of May 1, 1852, "to prescribe the duties of the attorney general," (S. & C. Stats. 88), and that authority is to be found if at all, in sections 9, 10 & 12 of the act.

Section 9 is as follows: "That upon complaint made to him that any incorporated company has offended against the laws of the state, misused its corporate authority or any of its franchises and privileges, assumed franchises and privileges not granted to it, or surrendered abandoned, or forfeited its corporate authority, or any of its franchises or privileges, he shall inquire into the complaint, and if he should find probable cause for so doing, cause proceedings in the nature of *quo warranto* or writ of *scire facias* to be instituted against it."

Section 10 is in the same terms, except that it authorizes the action of the attorney general to be taken of his own motion, where the knowledge comes to him otherwise than by complaint.

These sections authorize proceedings to be instituted only against an incorporated company; and when the attorney general proceeds

under them, he clearly admits thereby that the defendant has been incorporated.

That portion of section 12 which bears upon the question is as follows: "Whenever any person or number of persons shall act or assume to act as a corporation within this state without being legally authorized so to do, the attorney general may upon complaint made to him, or upon his own motion, cause proceedings in the nature of *quo warranto*, to be instituted, and the same diligently prosecuted to judgment."

This part of the act authorizes proceedings to be instituted when a natural person or any number of persons, without legal authority assume to act as a corporation and would seem to be the only authority under which the fact of incorporation can be drawn in question. The mode in which proceedings are to be instituted is not, however, expressly prescribed.

In the general *quo warranto* act of 1868 a similar distinction is made. The first section authorizes an information to be filed in the nature of a *quo warranto*, by the prosecuting attorney, "when any association or persons shall act as a corporation within this state without being legally incorporated;" while the eighth section authorizes a similar information to be filed "against any corporate body" when it has violated the provisions of its charter, forfeited its franchises by non-user, surrendered or misused its corporate franchises. In giving a construction to this statute in the case of the Granville Alexandrian Society, 11 Ohio 8, it was said by the court that the information under the first section must be against the natural persons who assume to act as a corporation, but under the eighth section it must be against the corporation.

As to the rule of the common law, the authorities, English and American, bearing upon this question are not so explicit and uniform as to relieve the subject from all doubt. Much learning and research have, from time to time, been shown in its discussion.

We do not propose to examine in detail the cases cited in argument. The most of the cases referred to by counsel for the state were informations against individuals. In the famous case of the City of London, 8 Howell's State trials, 1039, the question was presented and ably argued, but was left undetermined by the court, as the judgment was that the city had forfeited its corporate franchises.

In *Rex v. City of Chester*, cited in *Rex v. Amory*, 2 Term 565, there seems to have been a judgment against the city of Chester on default, for failing to show its right to be a corporation.

In this country, we think, the great weight of authority favors the ground taken by the counsel for defendant. In the *People v. Sar. & Rens. R. R. Co.*, 15 Wend. 114, it was held that "an information in the nature of *quo warranto* filed, under the revised

statutes, against a corporation by its corporate name, admits the existence of the corporation or that it once had a legal existence." The revised statutes of New York, it is true, differ from ours, in prescribing the different judgments to be rendered in proceedings against corporations and against individuals. But this distinction in the judgments has its foundation in the common law; and, in that case, C. J. Savage quotes, with approbation, from the language of Sir Robert Sawyer in *Rex v. City of London*. He says, "The rule is this: when it clearly appears to the court that a liberty is usurped by wrong, and upon no title, judgment only of ouster shall be entered. But when it appears that a liberty has been granted, but has been misused, judgment of seizure into the king's hands shall be given. The reason is given; that which came from the king is returned there by seizure; but that which never came from him but was usurped, shall be declared null and void. Judgment of ouster is rendered against individuals for unlawfully assuming to be a corporation. It is rendered against corporations for exercising a franchise not authorized by their charter. In such case, the corporation is ousted of such franchise but not of being a corporation. Judgment of seizure is given against a corporation for a forfeiture of its corporate privileges."

So, in a note to the case of *The People v. Richardson*, 4 Cow. 97 it is said by a learned judge: "If the information be for using a franchise by a corporation, it should be against the corporation. If for usurping to be a corporation, it should be against the particular persons." To the same effect is *Angell & Ames on Corporations*, § 756. See, also, *Commercial Bank of Natchez v. The State of Mississippi*, 6 Sm. & Marsh. 599.

The form of the information in this case is certainly not without sanction. 23 Wend. 193; 6 Cowen 196. But practically it seems to have been adopted and used only for the purpose of requiring the defendant to show its charter, in order that the extent of the franchises therein granted might be made the subject of inquiry.

We are aware of no case in this country, in which a body sued as a corporation, has been ousted of the franchise to be a corporation, on the ground that it never had a legal corporate existence. And, in England, the only case of that kind appears to be that of *Rex v. Chester*; and it is worthy of consideration that in that case, the defendant was a municipal and not a trading corporation. *Where the inhabitants of a city are defendants, the difficulty in proceeding against them might, perhaps, create an exception to the general rule.* But on principal it certainly seems irregular that judgment should be asked against a defendant whose very existence the plaintiff denies.

And if the information and process in this case could be regarded as proceedings against usurping individuals, by a name which they have assumed, the case would not be relieved from

difficulty. For, in that case, should judgment be rendered for the defendants on the question of corporate existence, the state could proceed no further. The corporation not being a party, no judgment of ouster could pass against it, for exercising franchises not authorized by charter. But the present information is against the defendant by its corporate name; process has been issued and served upon it accordingly; and in the same corporate character it has appeared and pleaded. We think it too late to question its corporate existence. We see no ground for discriminating, on this question, between the act which governs the proceeding in the present case, and the general *quo warranto* act. The practice, under both acts, has been uniformly the same; and persons assuming, without authority, to act as a corporation have never been proceeded against otherwise than individually.

The demurrer of the defendant to this replication will accordingly be sustained. * * *

PEOPLE EX REL. ATTORNEY GENERAL v. LELAND T.
STANFORD ET AL. AND THE POTRERO & BAY
VIEW RAILROAD COMPANY.

1888. SUPREME COURT OF CALIFORNIA. 77 Cal. 300; 19 Pac. 693.

THIS case was decided in department 1, and a rehearing granted. It was held by the department that the second count of the complaint was bad, and that it was error to overrule the demurrer thereto. We adhere to this conclusion, and to that extent the opinion of the department is adopted as the opinion of the court.

There was also a demurrer to the first count of the complaint, which was overruled by the court below. It is urged upon us that this count of the complaint is bad, for the reasons that conclusions are pleaded, and not the facts. The pleading is an anomaly. It sues the Potrero & Bay View Railroad Company as one of the defendants, and at the same time alleges that it is not a corporation. It alleges that the private individuals named as defendants, and the Potrero and Bay View Railroad Company, are falsely claiming that there is such a corporation, and that they have unlawfully held and exercised, and still do exercise and claim and hold unlawfully, divers powers, etc. It is well settled that a corporation cannot be sued as such, and brought into court, and the action maintained against it on the ground that it is not a corporation. If it is intended to draw in question the franchises of the corporation, the proceedings must be against the individuals who usurp the franchise. If it is claimed that the corporation is usurping privileges and powers not belonging to it, the corporation is the

proper and only proper party. Ang. & A. Cor. § 756; Boone, Cor. §§ 162, 163; State v. Coke Co., 18 O. St. 262; People v. R. R. Co., 15 Wend. 113; Draining Co. v. State, 43 Ind. 236. By making the corporation a party it is admitted that it once had an existence. Ang. & Ames Cor. § 756. In Draining Co. v. State, *supra*, the court says: "This first paragraph was clearly bad. It is not against certain persons claiming to be a corporation, but against the corporation by its corporate name. It is brought into a court as a corporation, to answer the allegation that it is not and never was a corporation. When a corporation is brought into court by its corporate name, its existence is thereby admitted." In this case, the corporation being made a party, its existence is admitted. It must follow, therefore, that there is no cause of action stated as against it. But there are other defendants sued jointly with it, and charged with having, jointly with such corporation, usurped the rights of a corporation, etc. There is no question made in the record or in the briefs as to the misjoinder of these parties. But we are clear that the people cannot bring both a corporation and the individuals who compose it before the court by information in the nature of *quo warranto*, and claim the non-existence of the corporation, thus brought before the court, and that the other defendants jointly with it, are claiming to be and exercise the right and privileges of such corporation. To permit such a course would be subversive of all rules of pleading. If we are right in the position taken, that by suing the corporation as such its existence is admitted, this is an end of the matter, so far as this count of the complaint is concerned, for the reason that the whole force of its allegations, as against the individual defendants, rests upon the sole ground that no such corporation exists.

If the complaint can be defended on the ground that it admits that such a corporation once existed, but has ceased to exist, it is open to the objection made to it, that it does not state the means showing how and by what means it has ceased to exist. We are of the opinion that it would be sufficient, in an action against individuals, charging that they are wrongfully claiming to act as a corporation, to allege in general terms, that there never was such a corporation. In such case the allegation that there never was such corporation covers the whole ground. Nothing can be added to this general statement which is in itself an allegation of fact. We are equally clear that where the existence of the corporation is expressly averred, or is admitted, it is not sufficient to allege that it has ceased to exist. The facts showing that its existence has terminated must be set forth; and if the claim is that the corporation is acting as such, but the proceedings under which it is acting are defective, the facts showing that it is so claiming to act, and the defects claimed to exist, should be set out specifically. Taking either

view of the complaint, therefore, we must hold this count to be bad, and that the court below erred in overruling the demurrer to it.

There was an answer to the complaint, to which a demurrer was sustained. Notwithstanding what was said in the opinion in department, we are constrained to hold that this was error. The answer for each and all of the defendants jointly and severally and specifically denies that "the defendants or any of them, claiming to be the said Potrero & Bay View Railroad Company, have for a long time, or do now, or at any time have unlawfully claimed or unlawfully exercised the franchises, powers or privileges in said city and county in this behalf in said complaint alleged, or any franchise, power or privilege." The other material allegations of the complaint are denied in like manner. It is urged that in an action of this kind it is not enough for the defendants to deny the allegations of the complaint, for the reason that the writ requires them to show affirmatively by what right they are exercising the franchises, and so it is held in department. This is true where it is admitted, or not denied, that they are exercising the rights and privileges alleged, and attempt to establish their right to do so. High, Ex Leg' Rem. §§ 712, 716.

But the defendants, whether it is the corporation or individuals, who are alleged to be wrongfully claiming to be such, may, instead of justifying their claim, deny that they are making such claim and exercising such privileges and rights alleged. It is certainly not necessary to justify their right to lay down and operate a railroad when they deny specifically that they are doing any such thing. The authorities cited in the former opinion are to the effect that the people are not bound to prove anything where the defendants attempt to justify their right or disclaim. 2 Dill. Mun. Cor. (3d ed.) § 893; Ang. & Ames Cor. § 756. But these authorities are only applicable where it is admitted, or not denied, that the defendants are exercising the franchises, and the question is as to the right to exercise them. That is not the case here. The issue presented is not one of the right to exercise a franchise, but whether it is being exercised. The impropriety of attempting to join the corporation and the individuals alleged to be acting as such in the same action, is thus made manifest. It is impossible that both could be doing the acts alleged. That the individual defendants are in the wrong, as alleged, can only be established by showing that there is no such corporation, and if the corporation does exist, and is itself exercising the franchises complained of, the individuals charged may truthfully, and with perfect propriety deny that they are exercising such franchises; and such a denial, it seems to us, is a complete defense, as to them, to the action. In this case, they not only deny that they as individuals, are doing the acts or exer-

cising the privileges, set forth in the complaint, but allege affirmatively that "the Potrero and Bay View Railroad Company was and is a corporation duly organized under and acting under the laws of the state of California, and lawfully entitled to own, maintain and operate its line of street railway along and upon the several streets, highways and roads in said complaint alleged, and in so doing to demand and receive fares and tolls in money from all persons and people who may pass over the same, over the cars of said Potrero & Bay View Railroad Company." The answer goes further than is necessary to meet the first count of the complaint. The individual defendants are the only ones against whom it can be claimed any cause of action is stated. They meet the whole of this cause of action by denying that they are or have been doing the acts complained of. They go a step further, and allege that some one else, viz., the Potrero & Bay View Railroad Company, is doing the acts set forth in the complaint, and that it has the right so to do. This latter allegation may be treated as mere surplusage; and the answer still contains a complete defense to the action. If we are right in the conclusion reached, that a general averment that no such corporation exists is sufficient, it must follow necessarily that a denial in the same general form is likewise sufficient.

It is clear that in the opinion of the department the first count of the complaint was understood to be against the railroad company, as an existing corporation, on the ground that it was exercising the privileges set forth without right. It is said: "The first count of the complaint alleged that the Potrero & Bay View Railroad Company never had the right and franchise to build and maintain tracks and run cars upon the streets within the city and county of San Francisco and the answer fails to aver facts showing that the company had such rights and franchises." We cannot so construe this count of the complaint. As we have said, it does not claim to recover on the ground that the corporation is usurping franchises or privileges not belonging to it, but, on the contrary, avers in direct terms, that there is no such corporation, and that the individuals named are claiming to be such corporation. This being true, we are of the opinion that the cases cited by counsel for the respondent to support their contention that a denial is not enough, the facts must be alleged showing a right to exercise the privileges claimed to be usurped, are not controlling. The case of the People v. Pfister, 57 Cal. 532, was one in which it was alleged that the corporation "never at any time legally existed as a corporation, and that, if it ever did so exist as a corporation, and was a corporation at any time, its full term of existence had expired, and it ceased to be a subsisting corporation on the eleventh day of November, 1887." The answer in the case was a "denial of all the material allegations of the complaint." No question seems to have been raised as to the form of either the complaint or the answer. Certainly no such

question is decided by the court. In the case of *The People v. Lowden*, 8 Pac. 66, the complaint alleged specifically the facts showing the illegality of the corporation. It was held that the facts stated must be specifically denied, and the denial of the legal conclusions drawn from the facts was insufficient. *People v. Clayton*, 11 Pac. 206, was an information to test the right of the defendant to hold a territorial office in Utah. It was held sufficient to allege generally in the complaint that the defendant "holds and exercises the functions of the office without authority of law therefor," and that such averment cast upon defendant the burden of affirming and pleading and proving his title to the office.

We do not question the correctness of these cases, but do not regard them as in any way antagonistic of the views which we have expressed. In the case of *The People v. Riverside*, 66 Cal. 288, 5 Pac. 350, it was alleged that the defendant was usurping the franchise to be a corporation. It was urged on the part of the defendant that the allegation that it was never incorporated was equivalent to an allegation that it never existed, and therefore no action could be maintained against it. The court says: "the argument is not devoid of logical force and unless the action given by the code differs in this respect from that which existed at common law the weight of authority is doubtless on that side; for it has been held in England and in this country that an information for usurping the franchise to be a corporation should be against the particular person guilty of the usurpation, (*Leroy v. Cusacke*, 2 Rolle 113; *People v. Richardson*, 4 Cowen 109); and it was held that *quo warranto* would not lie against one claiming office under a corporation which had no existence. But in Minnesota and New York, under statutes not materially different from our code in this respect, it has been held that the statutory action would lie against one usurping a town or county office, although no such town or county as the one in which it was claimed the office was usurped existed. *People v. Carpenter*, 24 N. Y. 86; *People v. Parker*, 25 Minn. 215. An allegation that a person had usurped the office of supervisor of the county of A. would be inconsistent with one that there was no county of A; and, since a city cannot exist in this state without incorporation, it is equally as inconsistent to sue one as a corporation, and at the same time deny its existence as a corporation. But for this there is a precedent, (*People v. Nevada*, 6 Cal. 143); and as no substantial right of any person can be prejudiced by following it, we think no good would result from not doing so; particularly as the object of the code would be effected, and justice promoted thereby." The opinion shows great doubt in the mind of the court as to the correctness of the rule laid down. No reason is given for the statement that the code changes the common law in respect to the proper mode of pleading, and we see none. That case differs from this, however. It was an action to deter-

mine the validity of certain proceedings, to incorporate the city of Riverside, and the particulars in which those proceedings were invalid, were specifically set forth. It would seem to be proper in such case that the defendant, claiming to be a city under such proceedings, and acting thereunder as such, should be made a party to an action in determining the validity thereof. Boone, Cor. § 162. In such a proceeding the trustees of the city could not be sued, as there could be no trustees if there was no city, and no individuals could be made parties as claiming to be a corporation. In case of a private corporation the rule must be entirely different. If no corporation exists, the parties who are claiming to be such may be proceeded against. That such is the only proper course where, as in this case, it is claimed that certain persons are unlawfully claiming to be, and are, exercising the functions of a private corporation which never had any existence, the authorities are, so far as we know, agreed, and such we believe to be the proper rule. In *People v. Flint*, 64 Cal. 49, this court held that in a proceeding of this kind, the corporation was the proper defendant. But there the facts were set forth showing that the defendant was a *de facto* corporation, acting under articles of incorporation, which were claimed and held by the court to be defective. The court after holding that the corporation was a necessary party, says: "It is well to say, to prevent any misconception, that if, on a new trial, after the alleged corporation had been made a party, it should be adjudged that it had never been legally a corporation, that in that case appropriate proceedings should be had by which the affairs of such *de facto* corporation should be wound up and settled by the trustees."

The statute of limitations is pleaded by way of answer, and a demurrer thereto was sustained by the court below. This it is claimed, was error, but as the case must be reversed on other grounds, and the pleadings amended, we express no opinion on the question.

As to the other questions arising upon the answer, they relate to the special answer to the second count of the complaint, which count of the complaint was held in the former opinion to be bad. We adhere to that opinion so far as it relates to these questions, except so far as it holds that a duly organized corporation cannot take an assignment, from its lawful owners, of a franchise to lay down and maintain a street railroad. This is based upon the constitutional provision that "corporations may be formed, under general laws, but shall not be created by special act." Art. 4, § 31. This provision applies to the formation or creation of corporations, and to the powers directly conferred upon them by legislative enactment, and cannot, in our judgment, be construed as prohibiting the assignment of a franchise to a legally organized corporation, by persons having the lawful right to exercise and transfer the same.

If we look to the judgment rendered in this case, it is apparent that it is founded upon the second count of the complaint, which was held by the department to be bad. It does not decree that there is or was no such corporation as the Potrero & Bay View Railroad, nor that the said corporation or the other defendants, are usurping the right to be such a corporation, but simply decrees that the plaintiff "recover of the defendants the said rights, powers and franchises by them, the said defendants, exercised and claimed, viz., of constructing, maintaining and operating an iron railroad, commonly called and known as a "street railroad," along and upon certain of the streets, roads and highways, to wit" describing the route; and the defendants are enjoined from exercising said franchises. We are of the opinion that, upon the decision of the department that the second count of the complaint was bad, the judgment of the court below should have been reversed, for the reason that the judgment of the court below cannot be supported by the first count. The sole ground upon which the first count is based, viz., the non-existence of the corporation, is left wholly undetermined by the judgment. The judgment appealed from is reversed, and the cause remanded.

See also *Commonwealth Bank v. State*, 6 Sm. & M. (Miss.) 599; *People v. Rensselaer, etc.*, R. Co., 15 Wend. (N. Y.) 114; *State v. Atchison, etc.*, R. Co., 24 Neb. 143; *Carmel, etc., Co. v. Small*, 150 Ind. 427; *People v. Ravenswood, etc., Co.*, 20 Barb. (N. Y.) 518.

5. Respondent as usurper of corporate office.

PEOPLE EX REL. HUDSON ET AL. V. P. E. DEMILL ET AL.

1867. SUPREME COURT OF MICHIGAN. 15 Mich. 164.

(INFORMATION in *quo warranto* to determine the legality of the election of wardens and vestrymen of St. Paul's Church, in Detroit.)

COOLEY, J. It is commonly a source of regret when a court is compelled to dispose of a case before it without passing upon the main questions raised; but the nature of the record in the present case is such as to leave us no alternative. We are clearly of the opinion that the information is fatally defective in two particulars.

It is defective, firstly, in not showing in what manner the organization in which the defendants are accused of having usurped office became a body corporate. When any person, or association of persons, is charged with usurping the franchise of a corporation, it is sufficient for the attorney general to call upon them, in general terms, to show by what authority they claim the right to exercise such franchise; but when the very nature of the proceeding is such as to as-

sume the actual existence of a corporation, and it is alleged that the defendants usurp some authority therein, no ground whatever is shown for calling upon the defendants to show their right until it is made to appear that a corporation exists. The claim to a corporate franchise, which does not exist in fact, may be a great public wrong, demanding immediate redress; but the claim to an office in a corporation which has no existence can hardly be a matter of public concern, unless accompanied with the attempt to exercise a corporate franchise; in which case the remedy would be an information, not for the unlawful intrusion into an office, but for the usurpation of the franchise. The information in a case like the present must, therefore, show that a corporation exists; for until that is shown, it is not made to appear that there is any office into which the defendants can intrude. The precedents in proceedings against public officers, are not applicable in all particulars to the case before us; since those are cases where the courts must judicially take notice of the existence of the offices, and no allegations are necessary to show how they were created.

The statute under which this information was filed (Comp. L. § 5291) authorizes this proceeding in the case of the usurpation of office "in any corporation created by the authority of this state." The information avers, in the words of the statute, that the corporation known as "the rector, wardens and vestrymen of St. Paul's Church, in the city of Detroit," of which the defendants claim to be wardens and vestrymen, is a "corporation created by the authority of this state"; and we might infer it to be the view of the pleader that the statute establishes a rule of pleading; whereas, in our opinion it only points out the cases in which an information may be filed, leaving the mode of showing that the case is one within the statute, to be governed by the rules of pleading before in force.

Where a corporation has been created by special charter, we do not regard it necessary, though perhaps usual, to do more in the information than to aver its existence in general terms; since the court is bound to take judicial notice of the charter. (Comp. L. § 2, clause 18), and is thus informed of the actual corporate existence. But as the body in question has no such charter, and if it exists as a corporation at all, must have been constituted such under some general law of the territory or state, by acts *in pais*, it is obvious that there is nothing upon the face of this information by which the court can see that the allegation that the church is a corporation is true in fact. The bare allegation that it is one is but a conclusion of law drawn by the pleader, but which the court ought to have the means of drawing for itself from the facts set forth.

We were referred upon the argument to several cases in which it has been held that when the state calls upon one to show cause why he claims to exercise a corporate franchise, or to possess a public office, the allegations of the attorney general may be of the most

general character, while the defendant is required to set forth specifically, and with particularity the grounds of his claim and the continued existence of his right. *People v. Mayworm*, 5 Mich. 148; *People v. River Raisin & Lake Erie R. R. Co.*, 12 Mich. 398. We have no disposition to qualify these decisions in any way. The state has always the right to demand of any one assuming a public office or franchise to show his authority therefor; but the state has no concern with the unfounded claims which parties may make to an office not existing in fact. The existence of the corporation in the present case is a jurisdictional fact which must be set forth; while there is no corresponding jurisdictional fact to be alleged in the cases cited. The right to file information in those cases depended solely upon the discretion of the attorney general; while in this case, there must be corporate existence, or he is not authorized to call upon defendants to show ground for their claims. Jurisdiction appearing, the facts relating to the intrusion or usurpation may be alleged here, as they were in those cases, in very general terms, and similar allegations to those referred to in the cases cited have not been objected to in the present case.

There is also a broad distinction in respect to this particular point between the cases now before us, and those cited by counsel from the Federal decisions, where the question related to the averment of citizenship, where one of the parties was a corporation. That question affected either personal rights to sue, or personal exemptions from being sued in the particular court; and the fact was one of which the court would take no notice in any stage of the case unless it was specially put in issue. But here the fact of corporate existence is not the basis of any authority at all in the court to act in respect to the subject of controversy, and it is not one in respect to which there can be a waiver by the parties. This proceeding by information is of a prerogative character, to enable the court to see that privileges or franchises granted by or pertaining to the sovereignty of the state are not usurped, intruded upon or abused; and it pertains to the dignity of the court to see that parties do not use it, even by consent, for private purposes. If the general allegations employed in this case were sufficient, and the proof could be waived by the parties, it would be easy to impose upon the court the disputes as to offices in voluntary associations, in no way affecting prerogatives of sovereignty, and to which this proceeding has no application whatever.

But if this were not a jurisdictional defect, there would still be reasons why the mode in which the corporation became such should be pointed out. Although the statute says the information may be filed against "any person" usurping office in "any corporation" created by authority of this state, yet there must be very many cases in which the court would be at liberty to refuse to listen to the controversy. When the proprietors of a country store, or the members

of a village library association, or the participants in a village district debating society, or an association of musical amateurs, may incorporate themselves under our general laws, and establish various grades of officers for the purpose of their organization, it can scarcely be urged that the Supreme Court can be required to settle all their contested elections and appointments in this proceeding. There are grades of positions denominated offices which do not rise to the dignity of being entitled to the notice of the attorney general by information, if, in fact, there be not corporations which are not within the intention of the statute—upon which we express no opinion. An information, filed in a case not proper for the consideration of the court, it should have the opportunity to dismiss in some preliminary stage of the case; and for that reason, if for no other, it ought to have the facts set forth which would direct it to the law authorizing the corporation, prescribing its functions, and indicating the powers and duties of its officers. We ought to be able to see whether the office is one provided for by the statute, or whether, instead, it is created by some derivative authority; so that we may draw the line of distinction between those which are “offices” within the meaning of the statute, and those which are rather the positions of agents or servants merely.

But the information is bad, secondly, because of misjoinder of parties, and of causes of complaint. It may be proper that the two parties claiming to be wardens should unite in a proceeding to test the right of those in possession, and that the eight vestrymen should do the same. This might depend upon the mode of election. But no mode of election, or appointment, could authorize persons claiming different offices, to unite their complaints and seek to determine the title to both offices in one proceeding, without a statute especially permitting it. There is no such statute in this state, and the difficulties in the way of making it of service are so great, that it could hardly be desirable that one should be passed. It is just as competent to test in one suit the right to the offices of sheriff and treasurer of a county, as to those of wardens and vestrymen in a church. They may derive their title from the same election, and the questions in dispute may be the same; but this is no more than will often happen when several offices of the same municipality are in contest at the same time. The misjoinder is as fatal as it would be for two persons, having distinct and separate claims for trespasses committed by two others, to join in a suit to recover damages therefor. The similarity of duties in the two offices, or the fact that the incumbents participate in the same duties, if such be the fact, cannot change this fundamental rule in pleading.

We are of the opinion that the demurrer is well taken. As, on the ground of the misjoinder, if for no other reason, an amendment could not be allowed, the judgment must be final.

CHRISTIANCY, J., and MARTIN, Ch. J., concurred.

CAMPBELL, J., being a party, did not sit.

Section 5.—Pleading, Practice and Procedure.**1. The pleadings in general.**

SINCE the manifest tendency of modern courts is to treat proceedings by information in the nature of *quo warranto*, as an ordinary civil proceeding, so far as that may be possible, it is consequently held that the general and well known principles and rules which govern good pleading in civil actions should also govern here, in so far, at least, as the same may be applicable. Although nearly all the states have passed statutes of *quo warranto*, yet few, if any of them, have definitely laid down rules respecting the pleadings or procedure in such cases and hence the courts are left to the usual principles and rules of the common law. But little, if any, change has been made in this respect, in those states possessing a code and practice act. In a few states, notably in Illinois, the courts, having regard for the criminal form of the information, have held that the rules of pleading applicable to criminal informations and indictments should govern; the information must therefore be made in the name of the "people" and conclude "against the peace and dignity," etc. In such states all the exactness characteristic of criminal pleadings is, theoretically, at least, required, in pleadings in *quo warranto*. With these few exceptions, however, it will be found that the usual rules applicable to good pleading in ordinary civil actions will govern the pleadings of both parties in *quo warranto*.

STATE EX REL. ATTORNEY GENERAL v. MESSMORE.

1861. SUPREME COURT OF WISCONSIN. 14 Wis. 125.

By the court, DIXON, C. J. Motion by the defendant to quash the writ and dismiss the information in a proceeding in the nature of a *quo warranto*, instituted by the attorney general for the purpose of removing the respondent from the office of judge of the circuit court for the sixth judicial circuit in this state, which, it is alleged he has usurped and unlawfully holds.

The information or complaint is in the form heretofore usually adopted when the proceeding was by information, properly so called, and avers generally that the defendant "for the space of one day and upwards, from the 11th day of April, 1861, has usurped, intruded into and unlawfully held, used and exercised, and still doth usurp, intrude into, unlawfully hold, use and exercise the office of judge of the sixth judicial circuit in the said state, without any legal

election, appointment, warrant or authority whatsoever therefor, in contempt of the people of the state of Wisconsin, to their great damage and prejudice." It concludes with a prayer for due advice in the premises and for due process of law against the defendant, that he may be made to answer by what warrant he claims to hold, use, exercise, and enjoy the office, and if no sufficient warrant be shown, that judgment of ouster be entered against him. The summons is directed to the sheriff of the county of Dane, and commands him to summon the defendant, if to be found in his county, to be and appear before the justices of this court, at the capitol, in the city of Madison, within twenty days after service thereof, exclusive of the day of service, then and there to answer to a certain information, in the nature of *quo warranto*, filed by the attorney general in this court on the day the summons was issued, whereby the defendant is required to show by what warrant and authority he has usurped, etc., the said office. It also directs the sheriff to summon and require the defendant to serve a copy of his answer to the information (a copy of which will therewith be served on him) upon the attorney general, at his office in the capitol, in the city of Madison, within twenty days after service of the summons and a copy of the information, exclusive of the day of service; and in default thereof he is notified that the attorney general will apply to this court for the relief and judgment demanded and prayed for in the information. It is tested in the name of the chief justice, and signed and sealed by the clerk of the court, but not subscribed by the attorney general.

The objections taken by the motion are: 1. The proceedings are not in the form of a civil action. 2. The writ is not sufficient as a summons, and the information not sufficient as a complaint in any action known to the laws of the state; and, 3. The writ is not a sufficient writ of *quo warranto*, nor a sufficient writ in a proceeding in the nature of *quo warranto* in that it fails to require the defendant to show by what warrant he holds, or claims to hold, the office which he is alleged to have usurped, and fails to name any day upon which he is to appear, but designates twenty days for that purpose, during all which time the court was not to be and was not in session.

The motion is framed to meet either of two views which it was thought might possibly be taken by the court. The last point is only relied upon in case we should be of opinion that the common law writ of *quo warranto* and the substituted statutory proceeding by information in nature of *quo warranto* are not abolished, and that the attorney general in the present case is attempting to pursue one or the other of those remedies. If they still exist and this proceeding was instituted in pursuit of either of them, there would seem to be little room for doubting its irregularity. But as the other points are predicated upon the abolition of the writ and the proceeding by information, and as we think they are abolished, comment upon this one becomes unnecessary.

Sec. 1, ch. 160, R. S., provides: "The writ of *scire facies*, the writ of *quo warranto*, and proceedings by information in the nature of *quo warranto*, shall be as here prescribed; and the remedies heretofore obtainable in those forms, may be obtained by civil action, under the provisions of this chapter. But any proceedings heretofore commenced, or judgment rendered, or right acquired, shall not be affected by this act. It shall not be necessary to sue out such writs in form."

This was originally section 331 of the Code of Procedure as enacted in 1856; and the chapter of which it is a part constituted sections 331 to 350 inclusive. Laws of 1856, p. 207. It was chapter 1, of title 13, as the code was afterwards classified and divided. At that time, therefore, there can be no doubt that the legislature intended the remedy in such cases should be by civil action in the forms prescribed by the code. The code was passed and published as one chapter, and no other construction could have been given. It is a "civil action", as it was then and still is defined by the statute. Secs. 1-6, Code; Secs. 1-6, ch. 122, R. S.

In the revision of 1858, the code was dismembered, and its various parts distributed through the statutes under the different titles and chapters. In doing this, sufficient regard seems not to have been had to the applicability of the language of particular sections. They were left to read as in their original connection, and thus much apparent confusion and uncertainty were introduced. The section before us is one among the many instances of the kind. It is declared that the remedies heretofore obtainable by the writ of *quo warranto*, and proceedings by information in the nature of *quo warranto*, "may be obtained by civil action under the provisions of this chapter." This chapter 160 contains no provisions whatever on the subject of civil actions. There is in strictness, nothing to which the language can be applied, and we are without a statutory guide for the proceeding. In its former connection it signified the civil action prescribed by the code, which was all but one chapter. To have been consistent and according to the obvious intention of the legislature and the revisers, it should have read "under the provisions of chapters 124 and 125 of these statutes." A similar question was raised and presented in the case of *Buckstaff v. Hanville*, decided on the first day of the present term (*ante* p. 83); and we held that such transposition furnished no sufficient evidence that the legislature intended any change, and that these "*dissecta membra*" of the code were to be construed as when they constituted one body of the law. This case must be governed by the same rule, and is therefore a civil action, to be commenced and prosecuted in all respects like other civil actions.

The same doctrine was, by implication, at least, held in the case of the State *ex rel.* Attorney General v. Foote, decided in the Janu-

ary Term, 1860. (11 Wis. 14.) The complaint in that case, as in this, was styled an "information"; and the summons here is copied from the one there used. No objection was taken to the form of the summons but the complaint was demurred to, principally on the ground that this court had no jurisdiction over the subject of the action. It was insisted that section three of article 7, of the constitution only gave this court power to issue this writ of *quò warranto* at the common law; and that the statutes of 1849 abolished the common law writ and substituted the proceeding by information; that the present statute abrogated both the writ and the information, and declared a civil action to be the only remedy; and as it was a mere civil action it could not be entertained. We considered that the framers of the constitution looked rather to the substance than to the form; that their object was not so much to give us power to issue a writ of a prescribed form, as to enable us to hear and determine controversies of a certain character; and that this jurisdiction could not be taken away by any legislative changes in the forms of the remedy, but that we might adopt any new process which was calculated to attain the same end. This was in accordance with the previous decisions and practice of this court. It had always taken jurisdiction of the proceeding by information in the nature of *quo warranto*. The demurrer was therefore overruled, but without a written opinion.

The language of chapter 160 in every way corroborates this view. All remedies in courts of justice are divided into actions and special proceedings. Sec. 1, ch. 122. Prosecutions of this nature are invariably denominated actions, of which in civil proceedings there is but one form. Section 6, under which this one is instituted, provides, "An action may be brought by the attorney general in the name of the state, upon his own information, or upon the complaint of a private party, against the parties offending in the following cases: 1. When any person shall usurp, intrude into, or unlawfully hold or exercise any public office, civil or military," etc.

It follows that the summons is irregular. The requirement that the defendant appear before the court, the statement of the object of the action, the *teste* and signature of the clerk, may not vitiate it, but it should have been directed to the defendant and subscribed by the attorney general. Sec. 2, ch. 124, R. S. It is however too late for the defendant to take advantage of these defects. After service he applied to the attorney general, and, by stipulation, obtained further time to answer. This was an appearance in the action, and a waiver of all objections to the form of the summons.

As to the complaint or information as it was called, it is undoubtedly irregular in not stating the facts constituting the usurpation or cause of action. It is little more than a statement of legal conclusions according to an ancient form. But these are defects which cannot be reached by motion to dismiss. The remedy is by demurrer or objection taken at the trial. Secs. 5, 9, ch. 125, R. S.

Motion denied.

Subsequently, but before the above opinion was filed and the grounds upon which the motion was overruled known to the counsel, the defendant filed an answer, and the state filed replications, and the attorney general moved for an order requiring the defendant to rejoin or demur to the replications, and for a jury in this court to try the issues of fact, which motion was disposed of in the following opinion:

By the court, DIXON, C. J. So much of the motion as asks an order requiring the defendants to rejoin or demur to the replications, is denied. We have already decided that this is a civil action. It must therefore be governed by the rules applicable to other civil actions. As the nature of the case does not admit of a counter claim the only pleadings are the complaint and the answer. Upon them the issue is considered fully made up so far as the pleadings are concerned, and a replication is not allowed. The attorney general has leave to withdraw his replications, and the cause stands for trial on the complaint and answer.

We are of the opinion that the other branch of the motion should be granted. The action is an important one. Although civil in form, it is in every other respect just what it was at common law—a public prosecution. The usurpation of an office, though it involves private rights and interests, has always been regarded as a public offense. The remedy is still by an action in the name of the state. It is instituted and conducted by the attorney general under his official oath and responsibility. In this case it involves the functions of a high judicial office, and the due administration of justice in a large section of the state. It should therefore be determined as speedily as possible consistently with a due regard to the rights of the defendant. He makes no substantial claim for delay. The questions of fact are few and simple, and will be quickly disposed of.

For these reasons, we think a jury should be called in this court.

See in general on the subject of pleadings in *quo warranto*, the learned note by Esek Cowen, Reporter, in 4 Cow. (N. Y.) 100.

See also *Bishop v. State*, 149 Ind. 223; *People v. Clark*, 4 Cow. (N. Y.) 95; *State v. Steers*, 44 Mo. 223; *Territory v. Virginia Road Co.*, 2 Mont. 96; *People v. Northern R. Co.*, 42 N. Y. 217; *People v. Albany, etc., R. Co.*, 1 Lans. (N. Y.) 308; *State v. Commercial Bank*, 10 Oh. 535; *State v. Hardie*, 1 Ired. L. (N. C.) 42; *Commonwealth v. Commercial Bank*, 28 Pa. St. 391, 395; *State v. Anderson*, 26 Fla. 240; *Hinckley v. Breen*, 55 Conn. 119; *Attorney-General v. Michigan, etc., Bank*, 2 Doug. (Mich.) 359.

Concerning the criminal nature of the pleadings in Illinois see *Lavalle v. People*, 68 Ill. 252; *Distilling, etc., Co. v. People*, 156 Ill. 448; *People v. Mississippi, etc., R. Co.*, 13 Ill. 66; *Wight v. People*, 15 Ill. 417.

In Ohio and New Jersey it is held that the rules of pleading established by the code of civil procedure do not apply to *quo warranto*. *State v. McDaniel*, 22 Oh. St. 354; *State v. Roe*, 26 N. J. L. 215.

2. The information, petition or complaint.

WHERE the information is filed *ex officio* by the attorney general it need not set forth the name of the person claiming the office usurped nor allege more than that respondents are unlawfully holding and exercising said office or franchise and that they have no lawful right or title to exercise the same. General rules apply to the form of the allegations in the information as well as to their sufficiency. Where the relator claims title, and induction as well as ouster is sought, the title of such relator must be set forth with all reasonable certainty. Where the information is to procure the forfeiture of a charter a substantial cause for forfeiture must be clearly alleged; so also of the facts constituting a breach of condition when such is relied upon. Where the action is to procure the forfeiture of a charter once legally granted, the information must run against the corporation *eo nomine*, but where it alleges the usurpation of the right to be a corporation it must run against the individuals claiming or usurping such right. Where the information is for usurping secondary franchises it is necessary to set forth the rights and privileges usurped and the information should inform the court of the statute under which said corporation was organized so that its rights and powers may be made known to the court. Amendments of the information before and at trial are usually as freely allowed as in ordinary civil proceedings.

See State v. Parsons, 40 N. J. L. 1; State v. Bailey, 16 Ind. 46; People v. River Raisin, etc., R. Co., 12 Mich. 389; State v. Anderson, 26 Fla. 240; People v. Ridgeley, 21 Ill. 65; State v. Town of Tipton, 109 Ind. 73; Thompson v. Moran, 44 Mich. 602; State v. Boal, 46 Mo. 528; State v. Bulkeley, 61 Conn. 287; State v. Lewis, 51 Conn. 113; State v. Kelly, 2 Kan. App. 178; People v. McIntyre, 10 Mont. 166; State v. Kearn, 17 R. I. 391; State v. Kempf, 69 Wis. 470; State v. Messmore, 14 Wis. 115; Davis v. State, 75 Tex. 420.

3. Plea or answer.

CLARK V. PEOPLE EX REL. CRANE.

1853. SUPREME COURT OF ILLINOIS. 15 Ill. 213.

TREAT, C. J. This was an information in the nature of a *quo warranto*, filed on the relation of Crane, against Clark, at the March Term, 1851, of the Pike Circuit Court. The information alleged in substance, that at the December Term, 1849, of the Pike County Court, the relator was appointed treasurer of the county, to fill a vacancy caused by the death of the incumbent; and he thereupon gave the requisite bond, took the prescribed oath, and entered upon the duties of the office; that he continued to discharge the duties

until September 12, 1850, when the defendant intruded into and usurped the office, and from thenceforth exercised the powers and duties pertaining thereto. * * *

During the same term, the defendant filed two pleas, to which there was a demurrer. * * *

(The court after reciting the pleas and defining the powers of the county court in removing county officers, continues):

The first plea is clearly defective. It fails to show that the relator was legally dismissed from the office of treasurer. It alleges that he was removed for various reasons stated in an order of the board of supervisors, but the order itself is not set forth. The reasons ought to appear at large in the plea, so that the court might determine whether the removal was for one of the causes specified in the statute. A dismissal for any other cause would not create a vacancy in the office, nor justify the board of supervisors in appointing the defendant. He could have no right to the office, unless the relator was properly removed therefrom. *In the proceeding by information in the nature of a quo warranto, the defendant must either disclaim or justify.* If he disclaims, the people are at once entitled to judgment. If he justifies, he must set out his title *specially*. It is not enough to allege generally that he was duly elected or appointed to the office; but he must state particularly how he was appointed or elected. He must show on the face of the plea, that he has a valid title to the office. *The people are not bound to show anything.* The information calls upon the defendant to show by what warrant he exercises the functions of the office, and he must exhibit good authority for so doing, or the people will be entitled to judgment of ouster. Cole on Criminal Informations, 210 to 212; Willcocks on Municipal Corporations, 486 to 488; Angell & Ames on Corporations, § 756.

The second plea is also too general; it does not state how the office became vacant; nor does it show with sufficient certainty how the defendant was appointed. The third plea is likewise defective. The defendant does not attempt to set out his title. It is no answer to the information, that the relator is not entitled to the office. The defendant must show that he is rightfully in office, or the people are entitled to judgment against him.

But there is an error in the judgment for which the judgment must be reversed. It does not appear that any disposition was made of the two pleas first filed. The record only shows that a demurrer to them was argued and taken under advisement. It fails to show that any decision was ever made by the court. The entry of the 22d of March, 1852, cannot be considered as applying to these pleas. From the description given, it manifestly relates to the second set of pleas. The judgment was entered at length on the following day, without noticing the fact that the order sustaining the demurrer had been already entered. These two entries evidently refer to the same

set of pleas. It was clearly error to render final judgment in the case without disposing of the demurrer to the first set of pleas. As that demurrer has not been decided, this court has no authority to pass upon the sufficiency of these pleas.

The judgment must be reversed, and the cause remanded.

Judgment reversed.

See also *People v. Percells*, 8 Ill. 59; *Commonwealth v. Cross Cut R. Co.*, 53 Pa. 62; *People v. Thompson*, 16 Wend. (N. Y.) 655; *State v. Jones*, 16 Fla. 306; *State v. Gleason*, 12 Fla. 190; *People v. Crawford*, 28 Mich. 88; *State v. Steers*, 44 Mo. 223; *State v. Davis*, 57 N. J. L. 80; *State v. McGarry*, 21 Wis. 496.

4. Replication and subsequent pleadings.

WHERE new matter is set forth in the plea, a replication may be filed and there would seem to be no reason why all the well known pleadings following the replication at common law are not permissible, unless changed by statute. Demurrers may be filed to the information or any subsequent pleading and when so filed reach back to the first defect. Amendments to pleas, replications, etc., are usually freely allowed.

5. Burden of proof.

PEOPLE EX REL. FINNEGAN V. MAYWORM.

1858. SUPREME COURT OF MICHIGAN. 5 Mich. 146.

AN information in the nature of a *quo warranto*, having been filed against the defendant, to inquire by what authority he assumed to exercise the office of sheriff of the county of Houghton, and suggesting that Michael Finnegan is entitled to the office; an informal plea was put in, claiming the office, and denying any usurpation; and the facts are agreed upon. * * *

We have, first, to inquire whether Francis Mayworm has made out his title to the office. If it should turn out that he has failed in this, the question will still remain, whether Finnegan has any rights in the premises.

It appears that Mayworm was appointed on the 25th day of December, 1856, to act, for the time being, in the vacancy created by the resignation of John Burns, whose original term had then but six or seven days to run. This appointment appears to have been regular. But it is not enough that an officer appointed for a temporary purpose, should show a legal appointment. The usurpation charged is a continuing usurpation, alleged to exist in the month of June, 1857, several months after the commencement of a new statutory

term. *The rule is well settled, that where the state calls upon an individual to show his title to an office, he must show the continued existence, of every qualification necessary to the enjoyment of the office.* The state is bound to make no showing, and the defendant must make out an undoubted case. It is not sufficient to state the qualifications necessary to the appointment, and rely on the presumption of their continuance. The law makes no such presumption in his favor. *State v. Beecher*, 15 O. 723; *People v. Phillips*, 1 Denio, 388; *State v. Harris*, 3 Pike 570; *State v. Ashley*, 1 Pike 513.

The case of the *People v. Phillips* was one where the defendant as here, claimed to hold over for the want of a legal successor; and, instead of showing that no person had, during the whole period, been chosen in his stead, merely showed one abortive election. The court held he was bound to show that no one had, at any time, been chosen to succeed him; and, in the absence of this, he was ousted. Mayworm has shown here that Burns did not qualify, and that Finnegan also did not. Conceding, for the present, that this was enough to cut them both both off, the case is still defective in not showing affirmatively that the vacancy had not since been filled, either by election, or by appointment of the local board. For, not only could the board of supervisors have ordered a new election (1 Comp. L., 103, 105), which would be valid, at least against all persons except the candidate chosen at the general election, whether, as to him, it would or would not be valid; but the law has itself provided a person upon whom, in the absence of any sheriff or under sheriff, the duties devolve, to the exclusion of all others. By section 435 (1 Comp. L. 210), it is declared that when there shall be no sheriff or under-sheriff, in any county, the judge of the circuit court shall designate one of the coroners to perform the duties of sheriff. The defendant has shown that when he was appointed for the time being, there was no coroner in office; but he has not shown that one was not elected to take office with the new official year; and, for anything that appears in the case, his own rights may have been terminated, either by the coming in of a coroner, or a new appointment or election to the vacancy in the sheriff's office. Upon this state of facts, we can raise no presumption in his favor, and the state is entitled to judgment of ouster against him. * * *

Judgment of ouster must be rendered against the defendant Francis Mayworm, and also that Michael Finnegan, the relator, is rightfully entitled to the office of sheriff of Houghton county.

Burden of proof on respondent.—*People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358; *State v. Sharp*, 27 Minn. 38; *State v. Saxon*, 25 Fla. 342; *People v. Crawford*, 28 Mich. 88; *State v. Beardsley*, 13 Utah, 502; *Montgomery v. State*, 107 Ala. 372.

STATE EX REL. BORNEFELD v. KUPFERLE.

1869. SUPREME COURT OF MISSOURI. 44 Mo. 154.

CURRIER, Judge, delivered the opinion of the court.

This is an information in the nature of a writ of *quo warranto*, the writ itself having long since fallen into obsolescence and disuse. The information initiates a civil proceeding to try the right to an office, although in its origin and form it partakes of a criminal character, and is a substitute for the original writ of *quo warranto*. But the proceeding is essentially civil, and that is the established doctrine in this state. (*Brisson v. Lingo*, 26 Mo. 496; *McElhany v. Stewart*, 32 Mo. 379; *Hequoemberg v. Lawrence*, 38 Mo. 535.) The information, answer, and reply are subject to the rules governing corresponding pleadings in strictly civil causes—the information in this regard answering to the petition in civil suits. The question whether, in a given suit, the *onus* of proof is shifted from the complaining party to his antagonist, must be determined upon an examination of the pleadings, and not by reference to the form and history of an obsolete writ.

Apply these principles to the pleadings in the present suit. The relator initiates the proceeding, and alleges in the information that he was duly appointed secretary of the German Insurance Company, and assumed the duties of that office; that on the second day of June, 1868, a minority of the board of directors of the insurance company held an illegal meeting, assuming to be a quorum, and without warrant of law appointed two associate directors, who thereupon assumed to act as such directors; that the board thus composed, illegally and without notice to the lawful secretary, in violation of the by-laws of the company, removed that officer and declared the office of secretary vacant, and thereupon appointed the respondent to fill the vacancy; that the respondent without any legal appointment or authority, assumed the place, and unlawfully continues therein, excluding the relator—the legal secretary—therefrom. This is the substance of the information, although it contains various other recitals and averments, and sets out in full certain by-laws which are supposed to have been violated by the proceedings complained of.

The answer denies the material averments of the information, and then proceeds to allege affirmatively a state of facts substantially negating the allegations of the information, and asserting the entire regularity of the proceeding of the directors in declaring the office of secretary vacant, and in the appointment of the respondent thereto. The relator replies, denying the affirmative allegations of the answer.

In that state of pleadings, on whom is the burden of proof? That is the material question in the case. Aside from an admission on

the part of the respondent that the relator was legally in office prior to the second day of June, 1868, and until the office was declared vacant on that day, neither party introduced any testimony at the hearing—each claiming that the burden of proof was on the other. The court held that the *onus* was upon the relator, and gave judgment accordingly.

This is a civil proceeding as already shown; and unless it is to be taken out of the category of other civil causes, in respect to the form and methods of trial, the judgment of the circuit court was clearly right.

The answer denies everything and the presumptions in law are all against the relator, and yet it is claimed that the affirmative is on the respondent. We hold differently. Every reasonable intendment is to be made in favor of the regularity of the proceedings complained of. They were the acts of a private corporation, and are to be presumed regular until the contrary appears. (22 Verm. 274.) It is alleged that two of the parties who acted were illegally put upon the board of directors. But they acted as directors notwithstanding, and were directors *de facto*. (Ang. & A. on Corporations, § 759.) In State *ex rel.* Danforth *et al.* v. Hunton *et al.*, 28 Verm. 594, which was a *quo warranto* proceeding, it was held that although the form of the issue required the defendants to show cause, and would therefore seem to indicate that the defendants should go forward, still the *onus* was on the relators; that the form of the issue did not correctly define the true position of the parties in regard to the presumptions of right. The court said: "The defendants are in the possession of the office in question and should be presumed regularly elected and entitled to hold until the contrary is shown. The plaintiffs, then, are bound to make a case against them, and they should go forward in the proof and in the argument." This puts the matter on clear and reasonable ground, and there is nothing in our statute to require a different and less reasonable practice. The New York Court of Appeals, in a late case, held the same doctrine announced in the case from Vermont. (See *People v. LaCoste*, 37 N. Y. 192; *State v. Brown*, 34 Miss. 688.)

This view of the subject substantially disposes of the motion in arrest. The proceedings of the board of *de facto* directors are to be presumed regular until irregularity is shown. They are not to be presumed irregular. The twenty second by-law, set out in the information, provides that "officers, except the president and vice-president, shall hold their offices until removed by a majority of the directors on a charge of disability, violation of duty, or any other sufficient cause." Under this rule the secretary was removable when the directors should consider there was sufficient cause for it, and they were the judges of the sufficiency of the cause. No formal notice of trial or charges was requisite. A majority of the *de facto* board of directors considered that a sufficient cause of removal had

arisen, and accordingly removed the secretary, as the information shows, and put another man in his place. Until their action is impeached by proof, it is to be presumed that they acted on sufficient grounds.

Let the judgment be affirmed. The other judges concur.

See also *People v. Lacoste*, 37 N. Y. 192; *State v. Hunton*, 28 Vt. 594; *Commonwealth v. Filer*, 30 Pitts. Leg. J. 296; *People v. Perley*, 80 N. Y. 624.

6. Statute of limitations no bar.

COMMONWEALTH v. ALLEN.

1880. SUPREME JUDICIAL COURT OF MASSACHUSETTS. 128 Mass. 308.

INFORMATION in the nature of a *quo warranto*, filed August 11, 1879, by the attorney general in behalf of the commonwealth, and at the relation of two citizens of New Bedford, alleging that the defendant was usurping the office of chief of police of the city of New Bedford. * * *

GRAY, C. J. This is an information at common law, not regulated by any statute, for the usurpation of an office, which the attorney general has the right to file *ex officio* in the name and behalf of the commonwealth, at his own discretion, and leave to file which the court has no authority to grant or to withhold; and the mention of relators is mere surplusage, and does not affect the validity of the information or the form of the judgment to be rendered thereon. *Commonwealth v. Fowler*, 10 Mass. 290; *Goddard v. Smithett*, 3 Gray 116; *Cole on Informations*, 196. *The lapse of time between the defendant's assumption of the office and the institution of this proceeding, whatever effect it might have as against a private person, cannot bar the right of the commonwealth suing by its attorney general.* * * *

Judgment of ouster.

Two views are equally admissible, to sustain the proposition that the statute of limitations is no bar to an action in *quo warranto*. Adopting the view-point that all actions in *quo warranto* are actions in which the real plaintiff is the state, complaining against some infringement upon its sovereign powers; the maxim "*tempus non occurrit regi*," will then apply. Or the view may be adopted that every usurpation, whether of an office or franchise like every breach of a condition in a charter, constitutes a *continuing* usurpation of breach and consequently the statute cannot apply.

7. General matters of practice.

STATE EX REL. MILLER v. SEYMOUR.

1902. SUPREME COURT OF NEW JERSEY. 67 N. J. L. 482, 51 Atl. 719.

QUO WARRANTO by the state, on the relation of Walter H. Miller against John Seymour. Motion to quash information and discharge rule to plead, and for a rule to show cause. Rule to show cause discharged.

GARRETSON, J. These proceedings are intended to test the title of the respondent to the office of president of the common council of the city of Orange. Two motions are presented to the court under the above title. The first is a motion to vacate a rule to plead to an information in the nature of a writ of *quo warranto* exhibited by the attorney general at the relation of a private relator, and to quash the information, and the second is a motion for a rule to show cause why a *quo warranto* should not issue. The grounds for the motion to vacate the rule to plead and to quash the information are that the defendant had not been served with any process prior to the filing of the information and the entering of the rule to plead, and had not then, and has not since, been brought into court; because the information was filed without the leave of the supreme court first had, and without notice to the defendant; and because the information was sued out in the name of a private relator, and without the granting of a rule to show cause, or any opportunity given to the defendant to show that the relator was irresponsible, or was acting in bad faith, or that public interests would be jeopardized by the institution of *quo warranto* proceedings. This motion raises the question of the proper procedure to be followed in the institution of proceedings by information in the nature of a *quo warranto* at the relation of a private relator.

The information in this case signed by the attorney general, by the attorney for the relator, and indorsed, "Let this information be filed. David A. Depue, C. J." was filed without any notice to the defendant, and the next proceeding was the rule to plead on the defendant. The attorney general may file an information *ex officio* in his own name, without any relator, without leave of the court, and without notice to the defendant. The manner of bringing in a defendant upon an information filed by the attorney general *ex officio* is set forth in the case of Attorney General v. Delaware & B. B. R. Co., 38 N. J. L. 282, where the court says the proper practice was pursued in the case of State v. Associates of Jersey Co., in 1849, "which was of this sort". "On filing the information the summons was issued, returnable the following term, served upon the secretary of the company, and upon its return a rule was taken

on the defendants to plead in thirty days. That practice may well be followed, modified only by our change of time as to return of process. The summons may be returnable in vacation, and may be served in the mode in which summonses can be served in ordinary actions, and upon its return a rule to plead may be allowed, by the court or justice." In the case of *Ford v. Turnpike Co.*, 21 N. J. L. 9, it was held:—"This is a proper application in behalf of the relators, and not a proceeding instituted by the attorney general. If the attorney general on behalf of the state, was about to institute this proceeding, he need not ask the permission of this court for the purpose. The institution of proceedings of this character at the instance of the relators, under the leave of the court, is authorized by statute, and only by statute. "No instance", said Lord Mansfield in *Rex v. Marsden*, 1 W. Bl. 580, "has been produced of informations in nature of *quo warranto* before the statute, unless filed by the attorney general. The courts at common law and in cases not within the statute, have no authority to direct such information, and leave the matter to the discretion of the attorney general."

This proceeding must be regarded as under our statute of 1795 (2 Gen. Sts., p. 2632), which is copied substantially from the statute of 9 Anne, ch. 20, and provides "that in case any person or persons shall usurp, etc., any office or franchise within this state, it shall and may be lawful to, and for the attorney general, with the leave of the supreme court, to exhibit one or more information or informations in the nature of a *quo warranto* at the relation of any person or persons desiring to sue or prosecute the same, who shall be mentioned in such information or informations to be the relator or the relators against such person or persons for usurping, etc., any such office or franchise, and to proceed therein in such manner as is usual in cases of information in the nature of a *quo warranto*." Under the above statute an information cannot be filed without leave of the supreme court, and this permission is not formal merely, but has been held to depend upon the sound discretion of the court, according to the particular circumstances of the case, made upon an application for leave to file an information. In *Miller v. Utter*, 14 N. J. L. 84, the court says:—"The granting of an information is not now a mere matter of course, but depends upon the sound discretion of the court, according to the particular circumstances of the case made upon the application for leave to file an information." In *Mitchell v. Tolan*, 33 N. J. L. 195, "The granting or withholding of leave to file an information in the nature of *quo warranto* at the instance of a private relator rests in the sound discretion of the court, even where a good objection to the title of the person whose right is called in question is shown." In *Roche v. Bruggeman*, 53 N. J. L. 122, 20 Atl. 730, "the court has adhered to the practice that a sound discretion must be exercised upon the particular circumstances of every case." If, then, such information can

only be filed by a private relator after the exercise of its discretion by the court, it would necessarily follow that that discretion must be exercised upon a hearing, of which the defendant has notice. The defendant had no notice in this case until after the information, and therefore the information filed must be quashed, and the rule to plead vacated.

The practice in cases of informations in nature of *quo warranto* at the instance of private relators so far as the reported cases disclose, has generally been to institute such proceedings by a rule to show cause. In some of the cases all the questions to be considered have been raised by pleas or demurrers to the information, and the report does not disclose the proceedings anterior to the filing of the information; but rules to show cause appear to have been granted in the following cases: *Miller v. Utter*, 14 N. J. L. 84; *Ford v. Turnpike Co.*, 21 N. J. L. 9; *Michell v. Tolan*, 33 N. J. L. 195; *Richards v. Hammer*, 42 N. J. L. 435; *Roche v. Bruggemann*, 53 N. J. L. 122, 20 Atl. 730. The only case suggesting a different course of practice is that of *Casterline v. Gummersall*, 24 N. J. L. 529, which was a motion to set aside the information, and a rule to plead granted at the same time, on the grounds that the application in the first instance, should have been for a rule to show cause, and that if the information may be filed in the first instance, the defendant must be served with process to appear before a rule can be taken upon him to plead. The court in that case held that it had been decided, in *State v. Freeland*, that in the case of a corporation, or a high public officer, a rule to show cause is first allowed, but not in the case of a small township officer, but did not adopt that as the rule in the case at hand, but held "that the defendant should be regularly brought in by process, and then ruled to plead at as short a day as the nature of the case will admit." But such practice seems to lose sight of the statutory requirement that the information can only be filed with the leave of the supreme court, and when the court, in the exercise of its discretion, is satisfied that permission should be granted. The proper practice in all cases where an information is sought at the instance of a private relator is, in the first instance, to apply for a rule to show cause.

Application is made in the case at hand for a rule to show cause why an information in the nature of a writ of *quo warranto* should not be filed, and a stipulation of facts has been agreed upon, setting forth that the relator is a resident and taxpayer of Orange; that he voted at the election held in Orange in April, 1900, for the office of President of the Common Council, to which Seymour was elected; that he voted against Seymour; that he made no objection to Seymour assuming the duties of the office of president of the council; that he never questioned the right of Seymour to preside at the meetings of common council, and to vote on questions pending before said council, until after the meeting of said council held Sep-

tember 9, 1901, at which the contract for lighting the streets of Orange was awarded to the United Electric Company; that he is an employe of a phonograph company of which one Gilmore, who, as president of the National Electric Light, Heat & Power Company, signed a bid for street lighting in Orange for five years, is also president, and that he applied for the rule to show cause and also filed his information at the request of Gilmore; that the National Electric Company was incorporated July 16, 1901; that Gilmore is president of the company; that no certificates of stock of said company have been issued to anyone except the incorporators and their assigns; that no money has been paid into the treasury of the company; that Gilmore was not an incorporator of the company; that he has never subscribed to the capital stock of the said company; that no subscriptions to the capital stock of the said company have been made in writing; that said company owns no real estate; that said company has no plant either in operation or under construction, in the state of New Jersey, or in any other place, from which lights for lighting the streets of Orange could be produced; that said company has no contracts in writing or otherwise for equipping an electric lighting station, or for building a building suitable for an electric lighting plant; that a plant suitable for lighting the streets of the city of Orange could not be constructed from the time of the said application, for the rule to show cause, October 25, 1901, and December 1, 1901.

The stipulated facts show clearly that the relator acquiesced in the election of the defendant, and permitted him to exercise the duties of the office which he now attacks, for nearly eighteen months, without attempting to question in any way the legality of the office, and that he now does it at the instance of the president of a private corporation for the purpose of promoting the private interests of that corporation. *Mitchell v. Tolan*, *supra*; *Shortt*, Information, *Mandamus & Prohibition*, 149.

The rule to show cause will be refused.

See also *Commonwealth v. Jones*, 12 Pa. St. 365; *Harris v. Pounds*, 66 Ga. 123; *Mathews v. State*, 82 Tex. 577; *Gilroy v. Commonwealth*, 105 Pa. St. 484; *State v. Rose*, 84 Mo. 198; *Capital City, etc., v. State*, 105 Ala. 406; *People v. Waite*, 6 Chicago Leg. News. 175; *Rex v. Orde*, 8 A. & E. 420 n.

As to costs see *Moss v. Patterson*, 40 Kan. 726; *State v. Jenkins*, 46 Wis. 616; *People v. Clute*, 52 N. Y. 576.

As to the nature and manner of serving the rule to show cause, see *United States v. Lockwood*, 1 Pinney (Wis.), 359; *People v. Golden Rule*, 114 Ill. 34; *State v. Barron*, 57 N. H. 498; *People v. Richardson*, 4 Cow. (N. Y.) 97; *Commonwealth v. Sprenger*, 5 Binn. (Pa.) 353.

As to the judgment, see *Campbell v. Talbot*, 132 Mass. 174; *Central, etc., R. Co. v. People*, 5 Colo. 39; *Smith's Case*, 4 Mod. 53; *State v. Bradford*, 32 Vt. 50; *Hammer v. State*, 44 N. J. L. 667; *Miners' Bank v. United States*, 5 How. (U. S.) 213; *People v. O'Brien*, 111 N. Y. 1.

Where the relator is a private citizen the usual practice is to file his application or petition in the proper court, asking leave to file an information. Such petition should set forth all the material facts upon which relator bases his claim for relief and should be verified. Upon the filing of such petition the court will usually issue a rule to show cause and unless respondent shows such cause on the return the rule will be made absolute, and the information will be allowed to be filed. Where the state's attorney, acting *ex officio*, appears as plaintiff or relator, no petition is necessary but the information is filed as of course. The application should be accompanied by affidavits containing positive allegations of facts upon which relator bases his prayer for relief. The rule to show cause is not sufficient to bring respondent into court; he must be brought in by the ordinary and regular process. An appearance of respondent to the rule to show cause is not an appearance to the information and no judgment can be entered against him save to make the rule absolute.

Amendments to the information are freely allowed as in pleadings in ordinary civil actions and defects merely in form are not sufficient ground to sustain a motion to quash. So the effect of a default in answering or pleading to the information is as a default in ordinary civil actions. Issues of fact arising in *quo warranto* proceedings may be sent to a jury for trial and changes of venue may be awarded as in civil actions. So, too, a new trial may be awarded where the verdict appears contrary to the weight of the evidence or for other error made by the trial court.

Respondent when answering to the rule to show cause may file counter affidavits, and if these appear to be sufficient in opposition to relator's allegations, the rule will be discharged. Costs will usually be awarded to the successful party. Although the statute of Anne and most of our modern statutes authorize a fine, such fine when levied will usually be merely nominal.

CHAPTER III.

PROHIBITION.

Section 1.—Definition and General Principles Governing the Writ.

1. Definition.

“As all external jurisdiction, whether ecclesiastical or civil, is derived from the crown, and the administration of justice is committed to a great variety of courts, hence it hath been the care of the crown, that these courts keep within the limits and bounds of their several jurisdictions prescribed by the laws and statutes of the realm. And for this purpose the writ of prohibition was framed; which issues out of the superior courts of common law to restrain the inferior courts, whether such courts be temporary, ecclesiastical, maritime, military, etc., upon a suggestion that the cognizance of the matter belongs not to such courts; and in case they exceed their jurisdiction the officer who executes the sentence, and in some cases the judges that gave it, are in such superior courts punishable, sometimes at the suit of the king, sometimes at the suit of the party, sometimes at the suit of both, according to the nature of the case.

The object of prohibitions in general is, the preservation of the right of the king's crown and courts, and the ease and quiet of the subject. For it is the wisdom and policy of the law, to suppose both best preserved when everything runs in its right channel, according to the original jurisdiction of every court; for by the same reason that one court might be allowed to encroach, another might; which could produce nothing but confusion and disorder in the administration of justice.

So that prohibitions do not import that the ecclesiastical or other inferior temporal courts are *alia* than the king's courts, but signify that the cause is drawn *ad aliud examen* than it ought to be; and therefore it is always said in all prohibitions (be the court ecclesiastical or temporal to which they are awarded) that the cause is drawn *ad aliud examen contra coronam et dignitatem regiam.*” 8 Bacon's Ab. 206, tit. “Prohibition.”

Blackstone defines Prohibition as “a writ * * * directed to the judge and parties of a suit in any inferior court, commanding them to cease from the prosecution thereof; upon a suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court.” 3 Blackstone 112.

The writ as it is used today may be defined as an extraordinary writ issuing out of a court of superior jurisdiction and directed to an inferior court or tribunal, commanding the latter to refrain from usurping or exercising a jurisdiction with which it is not legally vested.

STATE EX REL. ELLIS ET AL. V. ELKIN ET AL.

1895. SUPREME COURT OF MISSOURI. 130 Mo. 90.

BARCLAY, J. This is an original proceeding for a writ of prohibition.

The petitioners who ask the writ are citizens and taxpayers of Montgomery County.

The defendants are the judges of the county court of that county.

The subject of controversy is the removal of the county seat.

The application for the writ was first made to this division of the court, February 5, 1895, by certain petitioners who afterwards retired from the case; but before they were well out, the persons now prosecuting the action came in, and were made parties demanding the desired writ.

The defendants have made return, showing their cause why the prohibition should not go.

Upon this return the petitioners have moved for judgment.

This motion for judgment upon the return must be taken to admit all facts well pleaded, in the return; and upon that motion the cause has been submitted.

The return of defendants is accompanied with several exhibits of copies of records, bearing on the point on which our judgment is asked.

The principal facts that control the result are not disputed. Their legal effect alone is in controversy.

During last summer, the county court of Montgomery (upon due application, the sufficiency of which is not questioned), ordered that a proposition to remove the seat of justice of that county from Danville to the city of Montgomery be submitted to the qualified voters of the county at the general election November 6, 1894.

The proposition was accordingly submitted.

When the returns of the election had been received, the county clerk and two justices of the county court, made a canvass of them, November 8, 1894, and the record then made of the result (so far as relates to the removal of the county seat) is given by "Exhibit B" of the return, as shown in the statement preceding this opinion.

Afterwards December 26, 1894, the county court took action upon the subject, in the manner described by the record which forms "Exhibit C" of the defendants' return (also given in the statement).

The commissioners to locate the seat of justice in Montgomery City under the order of December 26, 1894, were to meet February 9, 1895, but the rule in prohibition in this action was served upon the defendants, as judges of the county court, February 6, 1895.

The general position of the petitioners is that the order for the removal of the county seat was without authority and void.

To this contention defendants made several answers, each of which will be considered.

1. It is first insisted that prohibition is not properly allowable to stop action by a county court in regard to the removal of the county seat.

It is very true that the subject matter of changing the location of a county seat belongs to the administrative department of the county court. That has often been asserted in decisions of the supreme court, the latest of which is *St. Louis, etc., Co. v. City* (1887), 92 Mo. 165 (4 S. W. Rep. 665.)

In one case it was held that prohibition would not lie to prevent action by the county court in ordering the removal of the county seat, where the court was proceeding under the law of 1855, which required only a majority vote for such removal, while the case (as the supreme court held) was really governed by the law of 1865, which required two-thirds majority to carry the proposition. *State ex rel. West v. Clark Co.*, (1867) 41 Mo. 44. In that judgment, however, the court pointed out the difference between the exercise of judicial, and merely administrative powers, with reference to the use of the writ of prohibition.

Under the existing constitution and laws, there is no question of the size of the majority required to authorize the county court to act. "No county seat shall be removed unless two-thirds of the qualified voters of the county, voting on the proposition at a general election, vote therefor," says the organic law (Art. 9, sec. 2).

The statute law conforms to that command. (R. S. 1889, § 3138.)

It is the duty of the county court, under section 3145 (R. S. 1889) to perform the final act in the removal, by certifying its belief that the commissioners have selected the most suitable place for the public buildings necessary to the seat of justice. In so doing, the county court, no doubt, acts in its administrative capacity. Indeed, the whole proceedings for the change of a county seat belong to the same general department of governmental activity which that court exercises in the control of the county property

and county finances. But the action of the court, even on such subjects, is not beyond the control of the law.

The writ of prohibition is applicable whenever judicial functions are assumed which do not rightfully belong to the person or court assuming to exercise those functions.

It is the nature of the act which determines the propriety of the writ.

The county court, no less than other courts, can be prohibited from proceeding to give effect to acts of a judicial character which it has no lawful jurisdiction to perform.

The writ is as available to keep a court within the limits of its power in a particular proceeding as it is to prevent the exercise of jurisdiction over a cause not given by the law to its consideration.

Let us then examine the nature of the power exerted by the county court in its action December 26, 1894.

The county clerk, in conjunction with two judges of the court, Nov. 8, 1894, had made a canvass of the returns on the proposition for the removal of the county seat. They then had ascertained and certified that that proposition received twenty-two hundred and twenty-six votes, and that twelve hundred and thirteen votes had been cast against the removal.

That certificate also stated that the returns from Wellsville were in an imperfect condition when first received, but that they were again returned on that day to the county clerk, "with the certificate filled out, with the names of the judges and clerks attached thereto." After that recital the vote of the county was certified, as appears from the figures above quoted.

That canvass of the county returns was spread upon the official records of the county. It showed on its face that the proposition to remove the county seat had fallen short of the required two-thirds majority, and had therefore failed of adoption.

The result of the election having been thus certified, the county court had no power to change that result. It was bound to give effect to the vote returned by the election officers and duly authenticated.

To use a homely but very significant expression, it could not go "behind the returns."

The action which the court recorded December 26, 1894, undertook to recanvass, or (as the record implies) to complete the canvass of the results of that election. The court did so "by refusing to count any illegal vote, alleged or supposed to have been cast at Wellsville precinct," as its record declares. Having thus thrown out the vote of one precinct, the remaining vote gave the needed majority to the proposition for removal, which the court then pronounced adopted.

Even if the proceedings of Dec. 26, 1894, be regarded as the first canvass of the county vote, it appears that at that time the Wellsville vote had been duly certified. That vote could then no more be discarded by the county court, if acting as a canvassing board, than any other mere canvassing authority, under the settled law of this state. *Mayo v. Freeland*, (1847) 10 Mo. 630; *State ex rel. v. Steers*, (1869) 44 Mo. 223; *Bowen v. Hixon*, (1870) 45 Mo. 340; *State ex rel. v. Trigg*, (1880) 72 Mo. 365.

At this point we touch the very gist of the case.

To change the result announced and certified by the election officers requires the exercise of judicial power. To get rid of the vote of Wellsville precinct in the matter at hand, it was necessary for the county court to use a power such as is ordinarily exerted in the contest of an election.

The act of the court was not a mere announcement of the result, as certified by the officers to whom the law confided the duty to certify. It was judicial action upon the result so certified. It was judicial action which substituted a different result from that exhibited by the certified returns.

We regret the occasion that requires us to say that the use of such power by the county court, in the circumstances was not authorized by law. The attempted action was judicial in its nature, and, as such, beyond the jurisdiction of the court in the matter it then had in hand.

It is precisely such a case as the writ of prohibition is designed to reach—a case of assumption of authority to pass judgment upon a subject not committed by law to the decision of the tribunal so assuming to act.

Although the court had jurisdiction of the subject matter, namely, the power to hear and determine the general class of proceedings to which that in question belonged, it did not have jurisdiction to use in such proceeding, a judicial power not applicable therein under the existing law.

The county court is a constitutional court of record, but its jurisdiction is defined to be "to transact all county and such other business as may be prescribed by law." Cons. 1875, art. 6, § 36.

The law governing its action in regard to the removal of county seats (R. S. 1889, secs. 3136 and following) neither expressly nor by implication, confers any authority to act judicially upon the returns of the election, as was done in this instance.

The county court did not have the power to set aside the returns from any precinct; and, in assuming that power, it passed beyond the limits of the authority confided in it.

In many states of the union provision is made for the contest of elections for the removal of county seats. But in Missouri there are no express provisions of law for such contests. That fact,

however, cannot justly be held to enlarge the jurisdiction of the county court in reference to that subject. That court, we repeat, cannot act judicially upon the returns, for the purpose of revising the result they exhibit.

We conclude that the writ of prohibition will lie to stop further action by the court under the judgment of Dec. 26, 1894.

We consider that this decision does not conflict with the rulings which declare that the removal of the county seat belongs to the administrative or business department of county affairs. We regard the question here raised as involving principles not discussed in those cases, but which are of vital importance in dealing with the subject of elections. The case is not one of mere error of judgment in the matter which the court was authorized to act upon. Here is a plain assumption of power not appertaining to the court in the proceeding in which the power is sought to be applied.

In the exercise of the superintending control given to the supreme court by the constitution (const. 1875, art. 6, sec. 3), it is the plain duty of this court, when properly invoked, to grant a writ of prohibition if necessary to keep the county court from passing beyond the bounds of its proper authority into a field of judicial action not assigned to it, but plainly forbidden to it by the law.

2. But it is claimed that other remedies are available to check the defendants from proceeding in the matter of removing the county seat. That may be.

The court will decline to award a prohibition where a party can readily obtain a desired result by other methods of procedure, as was held in *Mastin v. Sloan*, (1889) 98 Mo. 252, 11 S. W. 558.

But those methods must be reasonably adequate, prompt and efficient.

The granting of a prohibitory writ is discretionary in the sense that the court will not issue it, unless the facts exhibited appear to justify the resort to such a remedy. Where other convenient and effective means of reaching the same result are open to the complaining party, the court may decline to award the extraordinary remedy. *But it is not bound to decline because there may be some concurrent remedy.* Whether other modes of relief are equally effective is a question to be determined in each particular exigency.

And where a state of facts is presented, calling for the use of the writ according to the principles and usages of law, and where no other remedy is available, its allowance is not discretionary, but a matter of right under our constitution. (Art. 2, § 10.)

In the present instance we have no hesitation in ruling that the resort to this writ is appropriate and lawful.

3. But it is then said that the matter has gone too far to be reached by a writ of prohibition.

The action of the county court in December was in effect, a judgment upon the election; a judgment beyond the jurisdiction of the court that entered it of record.

So long, at least as any part of it remains unexecuted, further proceedings upon it can properly be prohibited.

This point has been recently so fully discussed that a repetition of the argument upon it is deemed unnecessary. (State *ex rel.* v. Rombauer, (1891), 105 Mo. 103, 16 S. W. 695.)

A judgment rendered without jurisdiction certainly cannot be infused with life by a mere attempt to properly execute it.

The defendants were invoked to vacate the judgment as being unauthorized, some time before the date set for the commissioners to act in the matter of removal. The prohibitory rule in this case was served before that date; and final action by the county court would still be needed (under section 3145) to complete the removal, even had the requisite vote been given.

As the case stands, the judgment of removal cannot lawfully be carried out.

4. A suggestion has been made, looking toward action by this court in reference to steps taken by defendants since the preliminary rule in this case. We do not deem it needful at this time to go into that question.

We are dealing with sworn county officers, whom we have no ground to suppose have the slightest intention to disregard the law. The proceedings, which we have found it our duty to disapprove, were no doubt, taken by the county court under a mistaken apprehension of the extent of its authority in the premises. We have no reason to believe that defendants will not promptly conform their official action to the ruling we have made. So we reserve any action on the suggestion referred to.

It follows from what has been said that the motion for judgment is sustained, and the rule in prohibition is made absolute. BRACE, C. J., and MACFARLANE and ROBINSON, JJ., concur.

OPINION ON MOTIONS AFTER JUDGMENT.

Per curiam (BRACE, C. J., and BARCLAY, MCFARLANE and ROBINSON, JJ.).—Two points are presented by motions following the peremptory writ. In order that there may be no possibility of any misunderstanding of the effect of our rulings thereon, we file this memorandum.

1. The motion to quash the return to the peremptory writ is sustained for the following reasons:

The only return that can properly be made to a peremptory writ of prohibition is a return of compliance with it. Here, the writ commanded the defendants to conform their official action, as judges

of the county court, to the judgment so rendered. That judgment declared that the county seat of Montgomery county had not lawfully been removed from Danville, and that it could not be so removed under the official returns of the last election on that subject.

It now appears that the defendants, having meanwhile removed the county records from Danville to Montgomery City (as though the county seat had been lawfully transferred to the latter city) have held a session of the county court at Montgomery City, since the final judgment of this court and since the service of the peremptory writ upon them. In their return to that writ defendants significantly omit to state that they have conformed their official action to the judgment of this court, as the writ commands them to do.

Hence their return to the peremptory writ is insufficient. It is accordingly quashed. Defendants are required to make a further return to said writ within ten days from this date.

2. On the motion for attachment for contempt it is ordered that such attachment issue, returnable on the first day of the next term of this court; but in the meantime if the defendants shall obey in all respects, in its letter and obvious intent, the peremptory writ, and make full return thereof (as required by the order for a further return above made), the court will duly consider that fact at the opening of the next term, in determining what further orders be made in the matter of said contempt.

We trust that it may not be necessary to proceed to apply any drastic measures in this case to secure obedience to the orders and judgment of this court, and that defendants will render a prompt deference to the law which is binding and obligatory as well upon judges as upon all other citizens of the state.

JAMES S. THOMAS v. ANDREW W. MEAD, ET AL.

1865. SUPREME COURT OF MISSOURI. 36 Mo. 232.

HOLMES, J.— * * * That this court has original jurisdiction to issue the writ of prohibition can scarcely be denied. The supreme court is invested by the constitution with a general superintending control over all inferior courts of law in this state, and with original jurisdiction and power “to issue writs of *habeas corpus*, *mandamus*, *quo warranto*, *certiorari*, and all other original remedial writs, and to hear and determine the same. (Const. art. VI., § 3.) In respect of preeminence and power under the constitution, it holds a position analogous to that of the court of king’s bench in England, which, says Blackstone, “is a court of very high and transcendent jurisdiction,” and is “the supreme court of the common law in the

kingdom." Still more, this court is the final court of errors, and appeals in this state. Like the court of king's bench it will "keep all inferior jurisdictions within the bounds of their authority, and may either remove their proceedings to be determined here, or prohibit their progress below." (3 Bl. Com. 41.) A prohibition is an original remedial writ, and is as old as the common law. It was the king's prerogative writ, provided by the common law as a remedy for "encroachment of jurisdiction." (3 Blacks. Com. 112.) It is as it were, the counterpart of *mandamus*, which is in its nature affirmative, commanding certain things to be done; prohibition is negative in character forbidding to be done certain things that ought not to be done: and though not expressly enumerated in the constitution, it clearly comes within the words "other original remedial writs." It is directed to the judge and parties to a suit in any inferior court, and commands them to cease from the prosecution thereof, upon a suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, or that in handling matters clearly within their jurisdiction, they transgress the bounds prescribed by the law of the land. (3 Bl. Com. 112.) Says Judge Coke from the king's bench: "We, here in this court may prohibit any court whatever, if they transgress and exceed their jurisdiction. And there is not any court in Westminster Hall but may be by us here prohibited, if they do exceed their jurisdiction, and all this is clear and without any question." *Warner v. Sucterman*, 3 Bulst. 119.) One great object of the writ is to prevent conflicts between different courts, and a determination of the law in different ways by different courts; "an impropriety," says Blackstone, "which no wise government can or ought to endure, and which is therefore a ground of prohibition." (3 Bl. § 113.) It is granted at the instance of any one of the parties to the suit below, plaintiff or defendant, and even by a stranger (2 Inst. 602; 6 Com. Dig. 105); and because they deal in that which does not appertain to the jurisdiction of the court (2 Inst 607.) Indeed, the authorities are endless, and place the subject beyond all dispute. (2 Sel. 308; 6 Com. Dig. 105; 6 Bac. Ab. 579, 600; *Full v. Huchins*, Cowp. 424; *Buggin v. Bennett*, 4 Burr. 2035.)

STATE EX REL. ATTORNEY GENERAL v. YOUNG ET AL.

1881. SUPREME COURT OF MINNESOTA. 29 Minn. 474, 9 N. W. 737.

GILFILLAN, C. J.— * * * The writ of prohibition issues usually to courts to keep them within the limits of their jurisdiction. But it may also issue to an officer to prevent the unlawful exercise of judicial or quasi-judicial power; and, the other reasons for it existing, we see none why it should not issue to a person, or

body of persons, not being in law a court, nor strictly officers; as, if the legislature should assume in an unconstitutional manner to create a court of justice, and the person or persons appointed as its judge or judges should enter upon the exercise of the judicial functions thus attempted to be conferred, the same reasons might exist for arresting their actions as exist in the case of a court exceeding its jurisdiction. The exercise of unauthorized judicial or quasi-judicial power is regarded as a contempt of the sovereign which may result in injury to the state or citizens.

Three things are essential to justify the writ: First, that the court, officer or person is about to exercise judicial or quasi-judicial power; second, that the exercise of such power by such court, officer or other person is unauthorized by law; third, that it will result in injury for which there is no other adequate remedy. * * *

See also *People v. Circuit Court*, 173 Ill. 272; *Connecticut River R. Co. v. County Com'rs*, 127 Mass. 50; *State v. Burckhardt*, 87 Mo. 533, 537; *Thomson v. Tracy*, 60 N. Y. 31; *State v. Kirkland*, 41 S. Car. 29; *Spring Valley, etc., Co. v. San Francisco*, 52 Cal. 111; *Speed v. Detroit*, 98 Mich. 360; *Fleming v. Commissioners*, 31 W. Va. 608; *Planters' Ins. Co. v. Cramer*, 47 Miss. 200; *State v. Towns*, 153 Mo. 91; *Reid, Ex parte*, 50 Ala. 439; *Shumaker, In re*, 90 Wis. 488.

A careful distinction must be made between injunction and prohibition. While these two remedies in many respects, especially in their negative character, resemble each other very closely, yet they differ essentially in their substance as well as form. *Where an injunction issues to restrain proceedings at law it acts upon the parties litigant only; it never denies the jurisdiction of the court nor is directed to the court. Prohibition, on the contrary, ignores the parties completely and, denying the jurisdiction, is addressed to the court itself.* Injunction may issue from a court of coordinate jurisdiction; prohibition, never, for it is based essentially upon the supervisory power possessed by superior over inferior tribunals.

In some respects, prohibition may be termed the counterpart of Mandamus in that it is negative in its character while Mandamus is essentially positive or affirmative. Prohibition, however, never is extended to purely ministerial acts. *Maurer v. Mitchell*, 53 Cal. 289.

2. A common law writ.

CONNECTICUT RIVER RAILROAD COMPANY v. COUNTY COMMISSIONERS OF FRANKLIN.

1879. SUPREME JUDICIAL COURT OF MASSACHUSETTS. 127 Mass. 50.

(THE petition was directed to respondents to cause them to refrain from assessing damages for land taken under statute by the manager of a railroad, owned by the state, for a passenger station and providing for compensation out of the earnings of the company. The contention was that the statute was unconstitutional.)

GRAY, C. J.—(After stating the facts.) * * *

Two questions are presented by the case, and have been argued by counsel: First. Whether the statute of 1878, c. 277, is unconstitutional, for want of a sufficient provision for the payment of compensation for the land taken? Second. Whether the writ of prohibition is a suitable remedy? * * *

(So much of the opinion as relates to the first point is omitted.)

* * * We have no information of any new taking of the land since the passage of the statute of 1879, and the remaining question is whether, upon the facts appearing on the record, a writ of prohibition will issue. * * *

A writ of prohibition issuing from the highest court of common law is the appropriate remedy to restrain a tribunal of peculiar, limited or inferior jurisdiction from taking judicial cognizance of a case not within its jurisdiction. 3 Bl. Com. 112. *Washburn v. Phillips*, 2 Met. 296. The power of issuing the writ was habitually exercised by the principal courts of the common law of England, and by the Superior Court of Judicature of Massachusetts under the Province Charter. The earlier acts of the Province establishing the Superior Court of Judicature was disallowed by the King in Council. Prov. Stats. 1692-3 (4 W. & M.) c. 33; 1697 (9 William III.) c. 9; 1 Prov. Laws (state ed.) 72, 73, 284, 285; Anc. Ch. 217, 221. But the act of 1699-1700 (11 William III. c. 3.) under which that court existed until the American Revolution, conferred upon it a very extensive jurisdiction of pleas of the crown and civil actions, "and generally of all other matters, as fully and amply to all other intents and purposes whatsoever as the court of King's Bench, Common Pleas and Exchequer within his majesty's kingdom of England have or ought to have." 1 Prov. laws, 370, 371; Anc. Charter 330. Under that act, the Superior Court of Judicature frequently issued writs of prohibition to the court of Vice Admiralty. See, for examples of this, *Thomas v. Calley*, rec. 1716, fol. 143; *Hutchinson v. Wybourne*, rec. 1716, fol. 169; *Harminy v. Wyre*, rec. 1717, fol. 177; *Manderson v. Hughs*, rec. 1718, fol. 259; *Tilton's case*, rec. 1720, fol. 338; *Dummer's Defence of the New England Charters* (1721) 63, 64; *Scollay v. Dunn* (1763) *Quincy* 74.

By early statutes of the commonwealth it was provided this court should have cognizance of all such matters as by the laws of the Province were made cognizable by the Superior Court of Judicature, unless where the constitution had provided otherwise; and should have power to issue all writs of prohibition and mandamus according to the law of the land, to all courts of inferior judiciary powers. Sts. 1780, c. 17; 1782, c. 9 § 2. In each subsequent revision of the statutes it has been provided that this court "shall have the general superintendence of all courts of inferior jurisdiction, to prevent and correct error and abuses therein, where no other remedy is expressly provided by law;" and "shall have power to issue writs of error,

certiorari, mandamus, prohibition, and *quo warranto*, and all other writs and processes to courts of inferior jurisdiction, to corporations and individuals, that shall be necessary to the furtherance of justice and the regular execution of the laws." Rev. Sts. c. 81 §§ 4, 5. Gen. Sts. c. 112, § 3. This court, therefore, is vested with ample power to issue writs of prohibition in proper cases, where there is no other adequate remedy, although, since the jurisdiction of cases in admiralty and of issuing writs of prohibition in such cases has been transferred to the courts of the United States by the Federal Constitution and statutes, and this court has been vested with the jurisdiction of divorce cases, and of probate appeals under the constitution and laws of the commonwealth, these writs have become less common, and but few instances of applications for them are to be found in our reports. *Washburn v. Phillips*, above cited; *Gilbert v. Hebard*, 8 Met. 129; *Vermont & Massachusetts Railroad v. County Commissioners*, 10 Cush. 12; *Day v. Aldermen of Springfield*, 102 Mass. 310.

In the present case, if the proceedings for the assessment of damages had gone on to final judgment, they might indeed have been quashed by writ of *certiorari*. *Charlestown Branch R. R. v. County Commissioners*, 7 Met. 78. *Charles River Branch R. R. v. County Commissioners*, 7 Gray 389. *Farmington River Power Company v. County Commissioners*, 112 Mass. 206. But the fact that the remedy by petition for writ of *certiorari* will be open to the land owner after final judgment affords no reason why the court should refuse a writ of prohibition, and thereby put the petitioner to the trouble, expense and delay of a trial before a tribunal which has no jurisdiction of the case, and to whose jurisdiction the petitioner has objected at the outset of the proceedings. *Gould v. Gapper*, 5 East 345, 367, 371. *Burdey v. Veley*, 12 A. & E. 233, 263, 265, 313, 314. *Vermont & Massachusetts Railroad v. Co. Com'rs*, above cited. The relief sought by bill in equity in *Talbot v. Hudson*, 16 Gray, 417, was to restrain the pulling down of a milldam by executive officers, not to prevent a judicial hearing, and determination by a tribunal transgressing its jurisdiction.

The fact that an agent of the commonwealth is the adverse party in the proceedings before the county commissioners affords no reason for refusing the writ. A writ of prohibition, like a writ of mandamus or of *certiorari* is properly sued out in the name of the crown or of the state; the only necessary defendant is the tribunal whose proceedings are sought to be restrained, controlled or quashed; and there is no class of cases in which the authority to issue writs of prohibition is better established than in those of courts martial, ecclesiastical courts, or inferior courts of common law, assuming to take cognizance in excess of their jurisdiction, of criminal prosecutions. *Washburn v. Phillips*, above cited. *Grant v. Gould*, 2 H. Bl. 69. *Com. Dig. Prohibition*, F. 6. *Searle v.*

Williams, Hob. 288. *Queen v. Herford*, 3 El. & El. 115. *Zylstra v. Corporation of Charlestown* 1 Bay 382.

Writ of prohibition to issue.

See also *Rickey v. Superior Court*, 59 Cal. 661; *Singer Mfg. Co. v. Spratt*, 20 Fla. 122; *State v. Judge, etc.*, 10 Rob. (La.) 169; *Arnold v. Shields*, 5 Dana (Ky.) 18; *Home Ins. Co. v. Flint*, 13 Minn. 244; *People v. District Court*, 26 Colo. 386; *State v. Rombauer*, 104 Mo. 619.

In the latter case Barclay, J., after reviewing the history of prohibition and the jurisdiction of the Supreme Court, held that the order to show cause may be made by a judge of the court in vacation.

3. Not a writ of right.

PEOPLE EX REL. ADAMS v. WESTBROOK ET AL.

1882. COURT OF APPEALS OF NEW YORK. 89 N. Y. 152.

(RELATOR held certain equitable claims against one Fox. Pending an action brought thereon, Fox died and the judgment rendered in relator's favor was set aside. The surrogate ordered a sale of the estate of Fox and published the usual notice to creditors. Relator insists that the surrogate has no jurisdiction over claims subject to an action pending in the Supreme Court. Order denying the writ made at general term of the Supreme Court. Relator appeals.)

RAPALLO, J.— * * * We do not deem it proper to pass now upon the claims of equitable relief set up by the relator and argued in the elaborate points which he has submitted, nor upon the question of the jurisdiction of the surrogate in the matter for the reason that we are of the opinion that the decision of the supreme court denying the writ of prohibition is not reviewable in this court. The writ of prohibition is an extraordinary remedy and should be issued only in cases of extreme necessity, and not for grievances which may be redressed by ordinary proceedings at law or in equity, or by appeal, *and it is not demandable as matter of right, but of sound judicial discretion, to be granted or withheld, according to the circumstances of each particular case.* (*Kinloch v. Harvey*, Harp. (S. Car.) 508.) This question was considered at an early day by the English courts, and was at one time a subject of controversy. In the reign of Charles II, case of the Lord Admiral v. Linstead, (*Sinderfin* 178 (15 Car. 2)), it was said by the chief justice that prohibitions are discretionary; but this was denied by Keeling, J., and his view prevailed during that reporter's period. In *Sergeant Morton's case* (Sid. 65 (13 Car. 2.)) it is stated to have been the opinion of the whole court that prohibitions were grantable as a matter of right, and did not rest in discretion as was said in Hob. 67,

66b; and in *Woodward v. Bonithan*, (T. Raym. 2), in the same reign (12 Car. 2) it was agreed that the granting of the writ was not discretionary; but that such writs were grantable *ex debito justitiae*. It is worthy of note that all these cases arose during the judicial strife which was carried on in the sixteenth and seventeenth centuries between the courts of king's bench and the courts of admiralty, and they are all cases involved in that contest, the severity of which is described in *Benedict's Admiralty*, Ch. 6, § 74 *et seq.*, where it is said that matters raged so high that a war was declared between the two courts and prohibitions were hurled from Westminster Hall without much order. In 1648 the republican Parliament of England, at the instance of the friends of commerce and trade took sides with the admiralty and adopted the ordinance of 1648 (Scobell's collection, p. 147, Ch. 112) entitled "The Jurisdiction of the Court of Admiralty Settled." Under this ordinance the admiralty was administered by Dr. Godolphin until the restoration, in the year 1660, when it ceased to be in force, and the war of prohibition was resumed by the common law judges. It was at this period that the decisions to which I have referred, holding the writ of prohibition to be a writ of right and not discretion, were rendered by the King's Bench. But at a later date in II William the 3d, in the case of *Bishop of St. David v. Lucy*, reported in 1 Ld. Raym. 539, a writ of prohibition was denied by the court of King's Bench, and it appears by a note at page 545 that after this denial the bishop petitioned the lord chancellor for a writ of error upon this denial, and he, having some doubt, referred it to the attorney general, who certified his opinion to be that a writ of error would lie. Thereupon the writ of error was granted, and the whole record brought by the chief justice (Holt) into Parliament, and afterward, on hearing his opinion, the lords were of opinion that a writ of error would not lie in the case. The decision is also referred to in *Salk*. 136, and I find nothing later to the contrary.

In this state the principle of that decision has been adopted in the supreme court. *Ex parte Braudlacht*, (2 Hill 367), where Cowen, J., says: "We have a discretion to grant or deny the writ," referring to *State v. Hudnall*, (2 Nott & McC. 419, 423), and the same view is expressed by elementary writers. (High on Ex. Remedies, § 765; 2 Cray's Special Proceedings, 87.)

It being discretionary with the supreme court whether to grant or deny the writ, its order refusing to grant it is not appealable to this court.

The appeal must be dismissed with costs against the relator.
Appeal dismissed.

In accord.—*State v. Judge, etc.*, 4 Rob. (La.) 48; *Smith. Ex parte* 23 Ala. 94; *State v. Seay*, 23 Mo. App. 623; *Gray v. Court, etc.*, 3 McCord (S. Car.), 175; *Singer Mfg. Co. v. Spratt*, 20 Fla. 122.

Contra, *Havemeyer v. Superior Court*, 84 Cal. 327.

FARQUHARSON v. MORGAN.

1894. QUEEN'S BENCH DIVISION OF THE HIGH COURT OF JUSTICE.
63 Law Journal N. S. 474; 1 Q. B. 552.

THE defendant was tenant to the plaintiff, of a farm under a lease which provided for certain allowances and compensation to be made, at the expiration of the tenancy, to the outgoing tenant as to various matters which are not the subjects of allowance or compensation under the Agricultural Holdings Act, (England) 1883, and it also provided that sections 7 to 28, both inclusive of that act, relating to procedure, should apply as well to any claim of the outgoing tenant for allowance or compensation to be made under the provisions of the lease as to any claim under the act. Subsequent to the expiration of the tenancy, an award was made in an arbitration, held under the provisions of the act of 1883, which showed on the face of it the matters in respect of which the sums thereby awarded were given, and also that it dealt with matters which were also the subject of allowance and compensation under the act as with matters outside the act. On an application by the tenant, the county court judge made an order under section 24 of the act for the enforcement of the award. The landlord moved for a writ of prohibition against the county court enforcing the award or proceeding further with the matter. * * *

LOPES, L. J.—This case raises the much vexed question whether the grant of prohibition is discretionary or whether it is demandable of right. It seems to me that there has always been recognized a distinction between what I will call a latent want of jurisdiction—*e. g.*, something becoming manifest in the course of the proceedings; and what I will call a patent want of jurisdiction—*e. g.*, a want of jurisdiction apparent on the face of the proceedings. Whilst in cases of latent want of jurisdiction there has always been a great conflict of judicial opinion as to whether the grant of the writ was discretionary or not, the authorities seem unanimous in deciding that where the want of jurisdiction is patent, the grant of the writ of prohibition is of course. Lord Mansfield in *Buggin v. Bennet*, (4 Burr. p. 2037) held that the court was not bound to grant a prohibition to a party who had acquiesced in the proceedings of the court below, except where the absence of jurisdiction was apparent on the face of the proceedings. In *Bodenham v. Ricketts*, (6 Nev. & M. 170, 537; 5 Law Jr. Rep. K. B. 102) Lord Denham laid down the rule in the same terms as Lord Mansfield; and about the same time the same rule was adopted in a considered judgment of the Queen's Bench in *Yates v. Palmer* (6 D. & L. 283.)

In the elaborate opinion of the judges delivered by Mr. Justice Willes to the House of Lords, in the *Mayor of London v. Cox*, (36

Law Jr. Rep. Exch. 225) it is said "that upon an application being made in proper time upon sufficient materials by a party who has not by misconduct or laches lost his right, its grant or refusal is not in the discretion of the court;" and at page 283 of the same case it is said "where the defect is not apparent and depends upon some fact in the knowledge of the applicant which he had an opportunity of bringing forward in the court below, and he has thought proper, without excuse, to allow that court to proceed to judgment without setting up the objection, and without moving for a prohibition in the first instance, although it should seem that the jurisdiction to grant a prohibition in respect of the right of the crown is not taken away, for mere acquiescence does not give jurisdiction.—Knowles v. Holden, (24 Law Jr. Rep. Exch. 223), yet considering the conduct of the applicant, the importance of making an end of litigation, and that the writ, though of right, is not of course, the court would decline to intercede, except perhaps upon an irresistible case, and an excuse for the delay, such as disability, malpractice or matter newly come to the knowledge of the applicant."

It was held in that case that the writ was not of course, inasmuch as there might be circumstances which would justify the court in refusing it, such as undue delay, insufficient materials, or misconduct or laches by the party applying for it. But there is nothing in the case contravening the rule which I have mentioned, where the absence of jurisdiction is apparent on the face of the proceedings—in fact, there is an express exception of such cases. In 1888, in the case of Broad v. Perkins, (57 Law Jr. Rep. Q. B. 638; Law Rep. 21 Q. B. D. 533) the question whether in the circumstances of that case the court had any jurisdiction to refuse a writ of prohibition was directed to be argued before the full court of appeals, and the Master of the Rolls (Lord Esher), delivering the judgment of the full court, repeated the opinion of Mr. Justice Willes in the Mayor of London v. Cox, *supra*, which I have above cited.

The result of the authorities appears to me to be this: that *the granting of a prohibition is not an absolute right in every case where an inferior tribunal exceeds its jurisdiction, and that where the absence or excess of jurisdiction is not apparent upon the face of the proceedings it is discretionary with the court to decide whether the party applying has not, by laches or misconduct, lost his right to the writ to which under other circumstances he would be entitled.* The reason why, notwithstanding such acquiescence, a prohibition is granted where the want of jurisdiction is apparent on the face of the proceedings, is explained by Lord Denham in Bodenham v. Ricketts, *supra*, to be for the sake of the public, lest "the case might be a precedent if allowed to stand without impeachment;" and I would add for myself, for it is a want of jurisdiction of which the court is informed by the proceedings before it,

and which the judge should have observed, and a point which he should himself have taken.

Now, if it were possible for him to do so, it is abundantly clear that Mr. Farquharson has by his conduct precluded himself from claiming the interposition of the court in his favour. That he has acquiesced in the proceedings is beyond dispute. I cannot imagine a stronger case of acquiescence. But I am aware that the award on the face of it discloses a want of jurisdiction. It contains and deals with matters which are not the subjects of the Agricultural Holdings Act—matters outside that act, and which cannot be enforced under section 24 of that act. In such circumstances most reluctantly I am compelled to hold that the writ of prohibition must issue.

DAVEY, L. J.—There are two principles which are ingrained in our law. One is that parties cannot by contract oust the jurisdiction of the Queen's Courts. This has been somewhat modified by the power given to the court by section 11 of the common law procedure act, 1854, (now section 4 of the arbitration act, 1889,) to give effect to an agreement to refer disputes to arbitration subject to certain well known conditions; but subject to this power it is no defense to an action, otherwise competent, that the parties have agreed to refer the question in dispute to arbitration, or to provide for its settlement in some other mode. The other principle is correlative to the first—that the parties cannot by agreement confer upon any court or judge a coercive jurisdiction which the court or judge does not by law possess. To do so would be an usurpation of a prerogative of the crown; and it has always been the policy of our law, as a question of public order, to keep inferior courts strictly within their proper sphere of jurisdiction—see the judgment of the common pleas in *Worthington v. Jeffries* (44 Law Jr. Rep. C. P. 209; Law Rep. 10 C. P. 379). It follows that a party may, notwithstanding that he has contracted to have the dispute decided or a decision in the matter enforced by the court not possessing by law jurisdiction, refuse to be bound by his contract and object to the jurisdiction subject to the provisions embodied in the Arbitration Act 1889, so far as applicable. It also follows that you cannot give jurisdiction by acquiescence. These principles are so well known that they need no illustration from decided cases or other authority.

In the present case, Mr. Farquharson, the applicant for a prohibition, has contracted by the lease of November 29, 1888, that the clauses of the Agricultural Holdings (England) Act, 1883, relating to procedure and contained in section 7 to 28 (both inclusive) shall apply as well to any claim of the outgoing tenant for allowance or compensation to be made under the provisions of the lease as to any claim under the said act. The lease makes provision for certain

allowances or compensation being made to an outgoing tenant at the expiration of the lease as to various matters which are not the subjects of allowance or compensation under the act. An amended award has been made dealing as well with matters which are properly subjects of allowance or compensation under the act as with matters in respect of which allowance can only be claimed under the provisions of the lease. And the amended award on the face of it shows the matters in respect of which the sums thereby awarded are given.

On the 24th of September 1893, the present respondent Morgan, made an application to the county court to enforce the award, and the learned judge, though he had doubts whether he had jurisdiction, made an order to that effect. The present applicant and appellants applied to the High Court for a prohibition against the county court enforcing the award or proceeding further with the application. A divisional court has dismissed that application on the ground that under the circumstances the court had a discretion to refuse the prohibition on the application of the present appellants. The jurisdiction of the county court in the matter, is statutory, and is conferred by the Agricultural Holdings Act. Section 24 of that act is in the following terms. (His Lordship read the section.) It is obvious that this section only applies to money agreed or awarded or ordered on appeal to be paid in respect of matters within the act, and gives no jurisdiction over awards as to other matters made pursuant to a contractual submission or with the consent of parties. Indeed it was not and could not be denied that so far forth as the award related to matters outside the act, the county court judge had no jurisdiction to enforce the award, and the applicant was *prima facie* entitled to the prohibition. But it was argued that the granting of a prohibition is discretionary, and that the applicant was estopped or precluded by his conduct from claiming a prohibition. Reliance was placed on a well known passage in Mr. Justice Willes' judgment in the *Mayor of London v. Cox*, which has been cited by Lord Justice Lopes. This passage has been adopted by the full court of appeal as a correct statement of the law in *Broad v. Perkins*, (57 L. J. Rep. Q. B. 638; Law Rep. 21 Q. B. D. 533).

It will, however, be observed that the learned judge's statement is confined to cases where the defect is not apparent, and depends upon some fact in the knowledge of the applicant which he might have brought forward in the court below, but has kept back without excuse—that is, where the applicant has been guilty of some misconduct in the proceedings, and has in a sense misled the court. To the same effect is Lord Mansfield's judgment in *Buggin v. Bennett*, *supra* "If it appears on the face of the proceedings that the court below have no jurisdiction, a prohibition may be issued at any time, either before or after sentence, because all is a nullity; it is

coram non judice. But where it does not appear on the face of the proceedings, if the defendant below will lie by, and suffer that court to go on, under an apparent jurisdiction (as upon a contract made at sea)"—Lord Mansfield was there speaking of an admiralty case—"it would be unreasonable that this party who when defendant below has thus lain by, and concealed from the court below a collateral matter, should come hither after a sentence against him there, and suggest that collateral matter as a cause of prohibition, and obtain a prohibition upon it, after all this acquiescence in the jurisdiction of the court below." This passage was quoted by Baron Parke in *Robert v. Humby* (3 Mee. & W. 120) in which case the court granted a prohibition at the instance of the party to the proceedings in a case where the want of jurisdiction appeared on the face of the proceedings, even after sentence in the inferior court. The reason of the distinction between cases in which the excess of jurisdiction appears on the face of the proceedings and where it does not so appear is explained by Mr. Justice Coleridge in *Marsden v. Wardle* (3 E. & B. 695; 23 Law Jr. Rep. Q. B. 263). "There is reason," says the learned judge, "for refusing the writ after judgment in the courts when the proceedings set forth the detail of the matter and the party has the opportunity of moving before judgment; then if he chooses to wait and take the chance of judgment in his favor, he may be held incompetent to complain of excess of jurisdiction if judgment is against him. There is, however, good reason for departing from this principle where the defect is apparent on the face of the proceedings below, because the complaint in that case does not rest on the evidence of the complainant; and if such a defective record were allowed to remain and support a judgment it might become a precedent, and that which was in truth an excess of jurisdiction might be considered to have been held to be legal." The learned judge is there evidently contrasting cases where the excess of jurisdiction depends on the evidence of the complainant with cases in which it is apparent on the face of the proceedings. In the county court it is true there is no record, strictly speaking, but the distinction does not, I think, depend on the existence of a formal record, but is one of substance, whether the defect is apparent or depends on evidence. In the present case the jurisdiction invoked is the creation of a statute not even conferring jurisdiction in general terms, but confined to a particular defined subject matter. The first question which a judge has to ask himself when he is invited to exercise a limited statutory jurisdiction is whether the case falls within the defined ambit of the statute; and it is his duty to decline to make an order as judge if, and so far as, the matter is outside the jurisdiction; and if he does not do so he may (if a judge of an inferior court) be restrained by prohibition. In the present case the limits of the jurisdiction appeared (I repeat)

on the face of the statute, and the fact of the excess appeared on the face of the amended award which the court was asked to enforce. I am therefore of the opinion that the appellant is not precluded from relying on the excess of jurisdiction in the county court either by his covenant in the lease or by the previous proceedings in relation to the award. In *Jones v. James* (19 Law J. Rep. Q. B. 257) which was cited on behalf of the respondent, it is to be observed that it is doubtful whether the court had exceeded its jurisdiction, and Mr. Justice Earle seems to have treated the matter as an irregularity in practice which might be cured by the defendant's waiver. And the case of *Moufet v. Washburn* (54 Law Times n. s. 16) seems to have been a case of the same character. In *Jones v. Owen* (5 D. & L. 669, 674; 18 Law Journal Rep. Q. B. 8.) it was held by Mr. Justice Patteson that where there was a total want of jurisdiction no consent could be given, and that learned judge said "It is said that the attorney for the defendant did not object to the jurisdiction, but that is not admitted on the other side. At all events, there was a total want of jurisdiction which no assent could cure."

The summons asks for a prohibition against the county court judge enforcing the whole award, but at the bar the learned counsel for the appellant limited the prohibition asked for to so much of the award as dealt with matters outside the Agricultural Holdings Act. Although I think that the applicant is not precluded from asking for a prohibition, yet he is doing so in breach of his contract, and I think there should be no costs in the court below, but the appellant should have the costs of the appeal.

Appeal allowed.

In accord.—*Smith v. Whitney*, 116 U. S. 167, 173; *Weston v. City Council*, 2 Pet. (U. S.) 449; *Forster, In re*, 4 B. & S. 187; *Mayor v. Cox*, L. R., 2 H. L. 239; *Worthington v. Jeffries*, L. R., 10 C. P. 379; *Burder v. Veley*, 12 A. & E. 233, 263; *Martin v. Mackonochie*, L. R., 3 Q. B. D. 730, 749; *Ellis v. Fleming*, L. R., 1 C. P. D. 237, 240.

4. Existence of other remedies.

STATE EX REL. BERRYHILL v. CORY, JUDGE, ETC.

1886. SUPREME COURT OF MINNESOTA. 35 Minn. 178; 28 N. W. 217.

WRIT of prohibition.

MICHELL, J.—This is not a proper case for a writ of prohibition. The action pending in the municipal court (forcible entry and detainer) is one proceeding, in the ordinary way, by summons, pleading, trial etc. The cause of action set forth in the complaint

is within the jurisdiction of the court. The only question is whether that court has power to try and determine the issues presented by the allegations of fraud and usury set up in the answer. If it errs in passing upon the extent of its jurisdiction in that regard, an adequate mode of review by appeal is open to the relator, and therefore a writ of prohibition ought not to issue. High Ex. Rem. § 770; *State v. Municipal Court*, 26 Minn. 162; s. c. 2 N. W. 166; *State v. District Court*, 26 Minn. 233; s. c. 2 N. W. 698.

Writ quashed.

THE STATE v. THE JUDGE OF THE COMMERCIAL COURT OF NEW ORLEANS.

1843. SUPREME COURT OF LOUISIANA. 4 Robinson, 48.

GARLAND, J.—Dubois, a member of the firm of Dubois & Kendig, represents that Benjamin Robertson, had obtained a judgment against them in the commercial court, and issued an execution thereon, by virtue of which the sheriff was about to sell property of great value, and that N. C. & L. Folger, had commenced a suit against them by attachment, and also seized certain property. He avers, that since the institution of these suits, he has been compelled to apply for the benefit of the bankrupt law, passed by congress in 1841; that the usual order has been granted on this application, and the notices published, but that no decree has been pronounced, nor any assignee appointed; that, in conformity to law he has surrendered all his property, and that of the firm to which he belongs. He avers, that by his application, all judicial proceedings are arrested, but that, notwithstanding, the judge of the commercial court, and the sheriff thereof, persist in proceeding with the aforesaid suits and execution, and will sell the property surrendered unless prevented. The petitioner, therefore, prays that a writ of prohibition may be directed to the aforesaid judge, and that the sheriff may be enjoined from further proceedings.

A rule was taken on the judge and sheriff to show cause why a prohibition should not be issued, and an injunction was issued temporarily, until the case could be heard.

The judge showed for cause:

First. That it is not alleged, in a direct manner, that an application was made to stay proceedings in the said suits, nor that any proof of facts was made, sufficient to authorize him to arrest proceedings; that if such facts existed, they ought to have been shown; and that no prohibition ought to be issued, until a regular application, supported by evidence, had been made to the inferior court, and been acted on.

Second. That the application is only on the part of one of the defendants, towit, Dubois; and that it is not shown that the proceedings can be arrested as to one, and not as to the other.

Third. That the power given to the supreme court to issue a prohibition, is only in aid of its appellate jurisdiction; and that it is not shown that the commercial court has refused an appeal, nor that it is a proceeding in disregard of one.

Fourth. That this tribunal has no power to act as an aid to the jurisdiction of the District Court of the United States.

For these causes, the judge prays that the rule may be discharged.

The judge proceeds to say, that Robertson had obtained a judgment against Dubois & Kendig about the last of November, 1842, on which an execution had been issued; but that he does not know what has taken place under it.

He shows for further cause, that nothing appears on the minutes or records of the court, to show that any application had been made to arrest the proceedings for the reason assigned in the petition, and that he has no recollection of any oral application to that effect.

He further shows, that the case of the Folgers was commenced by attachment, under which a number of horses and carriages were seized, and that the plaintiff took a rule on the defendants to show cause why the property seized should not be sold, on the ground that it was of a perishable nature, and that the expenses of the horses would, before the decision of the suit, amount to as much as they were worth. When this rule came on for trial, the counsel for Dubois & Kendig appeared and stated, orally, that Dubois had applied to be declared a bankrupt, since the rule was taken, and one of them had a newspaper in which he said the notice had been published. The judge told the counsel that he did not think it would keep him from proceeding; that it was best the property should be sold; and that it was immaterial whether the sheriff or the marshal sold it; as the money was ordered to be paid into court, where it would remain until the fate of the application of Dubois would be known, when the assignee might claim it. The rule to have the property sold was made absolute, whereupon the counsel intimated an intention to appeal; but the judge expressed some doubt as to the right to appeal, and it was not applied for.

It is true, as stated by the judge of the Commercial Court that the writ of prohibition is only one of the means by which this court can exercise its appellate jurisdiction. An application for it is one of the modes by which a case may be brought before us for examination; and it may be issued like the writ of mandamus, even where a party has other means of relief, if the slowness of ordinary legal forms is likely to produce such immediate injury or mischief as ought to be prevented. The writ of mandamus is given to enable this tribunal to command inferior courts to act, in cases where delay

will cause damage and injustice; and that of prohibition, to restrain them where acting without authority would have the same effect. We have heretofore said that this is an extraordinary writ, and should only be issued in a case of great necessity, when clearly shown; and before we will issue it, it must appear that the applicant has applied in vain, to the inferior tribunals for relief. In the present instance, no such showing is made.

As to the case of Robertson, the record is not before us, and there is nothing to show that any application was ever made to the commercial court, to arrest the proceedings on the execution, issued in his favor. The judge says there never was; and nothing from the records of the court is produced to disprove his statement, or to cause us to doubt its correctness.

In the case of the Folgers, it appears from the affidavit of the petitioner and the answer of the judge, that some conversation took place as to the application of Dubois for the benefit of the Bankrupt Act, at the time that the rule before mentioned was called for trial. But the record does not show that any objection or exception founded on that fact was raised. No legal evidence of it was exhibited, nor does it appear that the judge ever decided on it. What occurred, seems to have been nothing more than a conversation between the judge and counsel. The former says that he made no decision, further than saying when it was stated orally that an application to be declared a bankrupt was pending, that he "saw nothing that prevented Dubois from appearing as defendant in the rule." Upon such a statement of facts, we do not think this court has any power to interfere, without assuming original jurisdiction in the cause.

Rule discharged.

STATE EX REL. DEPUY v. EVANS.

1894. SUPREME COURT OF WISCONSIN 88 Wis. 255, 60 N. W. 433.

(RELATOR upon complaint made before respondent as justice of the peace, charging relator with having committed the crime of adultery with his niece, was arrested and brought before said justice for examination, and was thereafter bound over to the circuit court for trial. Relator in said court pleaded "not guilty" and the trial having begun and proceeded, the court sustained an objection to the evidence on the ground that the information did not charge an offense and discharged relator from custody. Thereupon relator was re-arrested upon a warrant issued by another justice, the action was

removed to Dopp, J. P., and by him dismissed for want of jurisdiction. Thereafter another complaint charging the same offense was made before Jewett, J. P., and relator was again arrested on a warrant issued by said magistrate. He thereupon made the statutory oath of prejudice and the cause was removed and certified to respondent's court, although he was not the next nearest justice of the peace. Relator pleaded to the jurisdiction and also former jeopardy and acquittal, all of which were overruled. Thereupon relator applied for a writ of prohibition to said respondent magistrate. Respondent made return to the alternative writ and relator demurred.)

CASSODAY, J. (After stating the facts.) In this state marriage "between parties who are nearer of kin than first cousins, computed by the rule of the civil law, whether of the half or of the whole blood", is expressly forbidden. Rev. Stats., § 2330. Such a marriage, "if solemnized within this state," is "absolutely void without any judgment of divorce or other legal proceeding". *Id.*, § 2349. The statute, moreover, declares that "Any person being within the degree of consanguinity within which marriages are prohibited, or declared by law to be incestuous and void, * * * who shall commit adultery or fornication with each other, shall be punished by imprisonment in the state prison not more than ten years nor less than two years." *Id.*, § 4582. Of course the justice of the peace had no jurisdiction to hear, try and determine the guilt or innocence of the accused for such a crime. *Id.*, § 4739. But he did have jurisdiction, upon proper complaint being made, to issue his warrant in proper form, and cause the accused to be brought before him, and to examine into the matters so charged, and if he found upon examination that the offense so charged had been committed, and that there was probable cause to believe the prisoner guilty, then to hold him to bail or to commit him to trial. *Id.*, §§ 4775-4792. The complaint upon which the relator was last arrested was subscribed and sworn to before Justice Jewett by the complainant, and is set forth in the foregoing statement. It purports to have been made after the complainant had been duly sworn and hence must be regarded as a sufficient examination of the complainant on oath to satisfy the statute. *State v. Nervobig*, 24 N. W. 321, 33 Minn. 480; *State v. Davie*, 62 Wis. 305, 22 N. W. 411; it contains a substantial statement of the offense, in positive terms, and that seems to be sufficient. *Ford v. State*, 3 Pinn. 449; *Gallagher v. State*, 26 Wis. 423.

That complaint, therefore, gave to Justice Jewett jurisdiction to issue a warrant, and cause the relator to be arrested and brought before him, and to examine whether the offense charged had been committed, and if so, whether there was probable cause to believe the accused was guilty. He did issue a warrant and caused the relator

to be brought before him for examination; and thereupon the relator made the statutory oath of prejudice, and demanded a change of venue, and the same was granted by sending the same to the defendant, as mentioned. It is claimed that the defendant, as justice, never got jurisdiction of the cause, because there was another justice of the peace, having an office nearer to Justice Jewett than the defendant. But the statute did not require Justice Jewett to send the cause to the nearest justice, but only to "transmit all the papers in the case to the nearest justice or other magistrate, qualified by law to conduct the examination." Rev. Sts., § 4809. This clearly implies that the cause is not to be sent to any justice or other magistrate who is disqualified by law to conduct such examination, even though he be the nearest. Manifestly the question whether such "nearest justice or other magistrate", is so qualified or disqualified must be summarily determined by some one. We have no doubt that it must be determined by the justice or other magistrate before whom such oath of prejudice is so filed; that is to say, in this case, by Justice Jewett. He necessarily did so determine that question in this case after hearing evidence *pro* and *con*. The authority to so determine includes the possibility of making a wrong determination. Nevertheless we must, upon the repeated decisions of this and other courts, hold that the determination of the justice or other magistrate so transmitting the cause is conclusive upon the parties and the justice or other magistrate to whom the cause is sent. *Martin v. State*, 79 Wis. 173, 48 N. W. 119; *State v. Sorenson*, 84 Wis. 31, 53 N. W. 1124.

The jurisdiction thus acquired by Justice Jewett by virtue of the complaint so made before him was successfully invoked in favor of the relator by the filing of his oath of prejudice as mentioned. Upon the filing of such oath and the transmission of the papers, such jurisdiction was necessarily transmitted to and vested in the defendant as such justice of the peace. The exercise of the jurisdiction so vested in the defendant, was thereupon invoked by the relator's asking the defendant as such justice, to dismiss the proceedings on the ground that he had previously been put in jeopardy of punishment for the same offense, and upon the further ground that the cause should have been sent to Justice Kimball, instead of the defendant; but the defendant as such justice, refused to dismiss upon either of those grounds.

The question whether the warrant issued by Justice Jewett was sufficient in form and substance to authorize the arrest of the relator, and the holding of him in custody is an entirely different question. It is a question which might properly have been submitted to and passed upon by either Justice Jewett or the defendant. If what purports to be a copy of the warrant, before us, is correct, then the warrant was certainly defective. It nowhere mentions any town,

village, city or county in which the alleged offense was committed or the proceeding instituted. The statute requires the warrant to recite "the substance of the accusation and requiring the officer to whom it shall be directed forthwith to take the person accused and bring him before the said magistrate or before some other magistrate of the county, to be dealt with according to law." Rev. Sts., § 4776. The statute does not require the complaint to be attached to or accompany the warrant, but the sheriff or other officer receives the warrant alone to be executed. The words "said county" in the warrant in question, are without significance, since no county is therein mentioned. The questions recur whether a writ of prohibition should be granted by reason of such defect in the warrant, or such other former alleged jeopardy of punishment. This court has repeatedly held that a writ of prohibition will not be granted where there is any other adequate legal remedy. *State v. Burton*, 11 Wis. 50; *State ex rel. Dilworth v. Braun*, 31 Wis. 606; *In re Radl*, 86 Wis. 645, 57 N. W. 1105, and cases there cited. High, Ex. Rem., § 770. In the case last cited this court refused to grant such writ to restrain a mere *de facto* justice of the peace from trying and determining a criminal case pending before him. In the *Dilworth* case cited, the writ was refused because the relator had an adequate remedy by another ordinary legal proceeding, to wit, by proving in the same action the former judgment in bar. For the defect in the warrant mentioned, the relator certainly had numerous other adequate remedies. To allow such writ in such a case is to sanction its allowance in every case where the warrant is void upon its face, or where the complaint, information or indictment is insufficient. That would be a complete revolution in criminal procedure. So this court has repeatedly held that under our statutes such writs issue only to restrain the acts of a court or other inferior tribunal exercising some judicial power which it has no legal authority to exercise at all. Rev. Stats., §§ 3457-3462; *State v. Gary*, 33 Wis. 93; *In re Radl*, 86 Wis. 645, 57 N. W. 1105. In *State v. Keyes*, 75 Wis. 238, 44 N. W. 13, the writ was invoked on the ground that the municipal judge was, without legal authority exercising the inquisitorial function vested only in the grand jury, but the court held otherwise. In that case, the present chief justice speaking for the court, said: "The writ lies only to restrain the exercise of judicial functions outside or beyond his (the municipal judge's) jurisdiction in the matter." 75 Wis. 298, 44 N. W. 13. The principles applicable are well stated by a late text writer: "A writ of prohibition is an extraordinary writ issuing out of a court of superior jurisdiction, and directed to an inferior court, commanding it to cease entertaining jurisdiction in a cause or proceeding over which it has no control, or where such inferior tribunal assumes to entertain a cause over which it has jurisdiction, but goes beyond its legitimate powers, and trans-

gresses the bounds prescribed to it by law. * * * It should be issued only in cases of extreme necessity, and not for grievances which may be redressed by ordinary proceedings at law or in equity; and it is not demandable as a matter of right, but of sound judicial discretion, to be granted or withheld according to the circumstances of each particular case. * * * It is the means by which the superior court exercises its supervisory power over the inferior court, and keeps it within the limits of its rightful jurisdiction." 19 Am. & Eng. Enc. of Law, 263. To the same effect, High, Ex. Rem. (2d ed.) 762, 763, 765, 781. It is collateral to and independent of the action or proceeding sought to be prohibited, and is to prevent further prosecution of the same by a judicial tribunal having no jurisdiction thereof. *Id.* A writ of prohibition is not to perform the office of a writ of error. Its purpose is to prevent an inferior tribunal from assuming the jurisdiction not legally vested in it, or from exceeding its lawful authority. *State v. St. Louis Court of Appeals*, 69 Mo. 216, 12 S. W. 661; *Alderton v. Archer*, 14 Q. B. D. 1. Where the inferior tribunal has jurisdiction of the subject matter, and the defendant is duly served with process or voluntarily appears a writ of prohibition will not be granted. *In re Cooper*, 143 U. S. 742, 12 Sup. Ct. 453. If, as claimed, the relator had previously been put in jeopardy of punishment for the same offense, then that was a legitimate matter of defense in the ordinary way. A writ of prohibition is not to be resorted to where the usual and ordinary forms of remedy are sufficient to afford redress, as by motion, trial, appeal, writ of error, *habeas corpus*, or otherwise. *State v. Nathan*, 4 Rich. Law, 513; *State v. Cory*, 35 Minn. 178, 23 N. W. 217; High, Ex. Rem. (2d ed.), § 771. Where the inferior tribunal has jurisdiction to do the act sought to be prohibited, but the manner of doing it is improper or even unauthorized, a writ of prohibition is not the remedy. *Ex parte Smith*, 23 Ala. 94; *People v. Whitney*, 47 Cal. 584; *State v. Judge of Fourth District Court*, 22 La. Ann. 115; *Dayton v. Paine*, 13 Minn. 493 (Gil. 454). The demurrer to the return is overruled, and the alternative writ of prohibition is quashed.

See also *Braudlacht, Ex parte*, 2 Hill (N. Y.), 367; *Smith, Ex parte*, 23 Ala. 94; *State v. Burton*, 11 Wis. 50; *Hamilton, Ex parte*, 51 Ala. 62; *State v. Elkin*, 130 Mo. 90; *People v. Wayne Co. Cir. Ct.*, 11 Mich. 393; *State v. Bowerman*, 40 Mo. App. 576; *Jaquith v. Fuller*, 167 Mass. 123; *Rice, In re*, 155 U. S. 396; *Tupper v. Dart*, 104 Ga. 179; *State v. Hocker*, 33 Fla. 283; *Coker v. Superior Court*, 58 Cal. 177; *Coleman v. Dalton*, 71 Mo. App. 14; *State v. Price*, 8 N. J. L. 358; *State v. Judge*, 48 La. Ann. 1372.

5. A *preventive*, not a corrective remedy.

HAVEMEYER ET AL. v. SUPERIOR COURT OF THE CITY
AND COUNTY OF SAN FRANCISCO.

1890. SUPREME COURT OF CALIFORNIA. 84 Cal. 327; 24 Pac. 121;
Post p. 519.

UNITED STATES v. HOFFMAN.

1866. SUPREME COURT OF THE UNITED STATES. 4 Wallace 158.

ON a motion for prohibition.

At the last term of this court the relator made application for a writ of prohibition to the judge of the District Court of the Northern District of California, to prevent that court from proceeding further in a certain cause in admiralty. This court without looking into the question of the alleged want of jurisdiction, granted a rule on the judge of that court to show cause why the writ should not be issued; and an order accompanied the rule, that he should proceed no further in the case until the decision of this court in the premises.

The return of the judge to that rule was now before this court. The substance of it was, that after the rule had been served upon him the libellant in the admiralty suit came into court, and moved for permission to pay all the costs that had accrued, and to dismiss the suit. After hearing argument, the court granted the motion, and the libellant having paid all the costs of both parties, an order was made dismissing the suit.

The relator now asked that the writ of prohibition might issue notwithstanding the return, and whether it should or not, presented the question to be here decided. * * *

MR. JUSTICE MILLER delivered the opinion of the court.

The writ of prohibition as its name imports, is one which commands the person to whom it is directed not to do something which, by the suggestion of the relator, the court is informed he is about to do. If the thing be already done, it is manifest the writ of prohibition cannot undo it, for that would require an affirmative act; and the only effect of a writ of prohibition is to suspend all action, and to prevent any further proceeding in the prohibited direction. In the case before us the writ, from its very nature, could do no more than forbid the judge of the district court from proceeding any further in the case in admiralty.

The return shows that such an order is unnecessary, and will be wholly useless, for the case is not now pending before that court, and there is no reason to suppose that it will be in any manner re-

vived or brought up again for action. The facts shown by the return negative such a presumption.

Counsel has argued very ingeniously that the case should be considered as remaining in the court below, in the same position that it was when the rule issued from this court; but we cannot so regard it. By the action of the libellant and the consent of the court, the case is out of court and the relator is no longer harassed by an attempt to exercise over him a jurisdiction which he claims to be unwarranted. If the return shows no more, it shows that the district judge has no intention of proceeding further in that case. Now, ought the writ to issue to him under such circumstances? It would seem to be an offensive and useless exercise of authority for the court to order it.

The suggestion that there are or may be other cases against the relator of the same character can have no legal force in this case. If they are now pending, and the relator will satisfy the court that they are proper cases for the exercise of the court's authority, it would probably issue writs instead of a rule, but a writ in this case could not restrain the judge in the other cases by its own force, and could affect his action only so far as he might respect the principle on which the court acted in this case. We are not prepared to adopt the rule that we will issue a writ in a case where its issue is not justified, for the sole purpose of establishing a principle to govern other cases.

We have examined carefully all the cases referred to by counsel which show that a prohibition may issue after sentence or judgment; but in all these cases something remained which the court or party to whom the writ was directed might do, and probably would have done, as the collection of costs, or otherwise enforcing the sentence.

Here the return shows that nothing is left to be done in the case. It is altogether gone out of the court.

These views are supported by the following cases:

In *United States v. Peters* (3 Dallas 121), which was an application for prohibition to the admiralty, this court suspended its decision to give the libellant an opportunity to dismiss his libel. The court finally issued the writ, but there seems no reason to doubt, from the report of the case, that it would have considered such action by the libellant as an answer to the request for the writ.

In the case of *Hall v. Norwood* (Siderfin 166), a very old case, when writs of prohibition were much more common than now, a prohibition was asked to a court of the Cinque Ports at Dover. While the case was under consideration, the reporter says: "On the other hand the court was informed that they had proceeded to judgment and execution at Dover, and therefore that they moved here too late for a prohibition, and of this opinion was the court, since there is no person to be prohibited, and possessions are never taken away or

disturbed by prohibitions." The marginal note by the reporter is this: "Prohibition will not lie after the cause is ended."

The rule heretofore granted in this case is discharged.

In accord.—*State v. Stackhouse*, 14 S. Car. 417; *Hull v. Superior Ct.*, 63 Cal. 179; *Dayton v. Payne*, 13 Minn. 493; *State v. Potts*, 50 La. Ann. 109; *Brooks v. Warren*, 5 Utah, 89.

But as long as any part of the void judgment of the court remains unexecuted, prohibition will lie. *State v. Rombauer*, 105 Mo. 103; *Havemeyer v. Superior Ct.*, 84 Cal. 327; *St. Louis, etc., R. Co. v. Wear*, 135 Mo. 230; *State v. Elkin*, 130 Mo. 90.

STATE EX REL. CAMPBELL v. ST. LOUIS COURT OF APPEALS.

1888. SUPREME COURT OF MISSOURI. 97 Mo. 276.

BLACK, J. The prayer of the petition is, that the St. Louis Court of Appeals be prohibited from taking further cognizance of the case of *Richard v. Campbell & Houck*, who are the relators in this case, and that the court be commanded to transfer the cause to this court, on the ground that we alone have jurisdiction. From the pleadings it appears the city of Cape Girardeau passed an ordinance giving to Carroll the sole and exclusive right to operate a steam ferry-boat from that city to the Illinois shore, and of receiving and landing passengers and property within the corporate limits of the city, for the period of ten years. Carroll had a license for a like number of years from the local authorities on the Illinois shore. The city of Cape Girardeau refused Campbell and Houck a ferry license, and, without a license, they put their steamboat in the ferry business in opposition to Carroll, receiving and landing passengers within the corporate limits of the city.

Carroll commenced his suit in the circuit court against the relators and procured a temporary injunction restraining them from operating their ferry boat within the limits of the city. The defendant answered and also filed motion to dismiss the temporary injunction, and upon a hearing the injunction was dissolved and the petition dismissed. On the fifth of October, 1866, Carroll gave bond and perfected an appeal to the St. Louis Court of Appeals. In that court, Carroll filed an information in the case, stating that relators had violated the temporary injunction by running their ferryboat after he had perfected his appeal. To a rule issued by the St. Louis Court of Appeals to show cause why they should not be attached for contempt, the relators made formal answer, claiming, first, that the appeal from the circuit court did not reinstate the temporary injunction; second, that they had violated no process of the St. Louis Court of Appeals; and, third, stating that the case was one involving the

construction of the constitution of the United States and of this state, and the supreme court alone had jurisdiction, and asked that the cause be transferred to this court. To this answer, Carroll filed a demurrer and the court took the matter under advisement. The court, in the meantime, heard the case on its merits, the relators insisting that the court had no jurisdiction of the appeal.

On the third of May, 1888, the court of appeals rendered a judgment reversing the decision of the circuit court, and entering a judgment enjoining the defendants, relators here, from operating their ferryboat; and at the same time ordered an attachment for the defendants, to the end that they be brought to the bar of the court to receive punishment for violating the temporary injunction issued by the circuit court. Thereupon the defendants commenced this proceeding.

The first and most important question to be determined is, whether the court of appeals had jurisdiction of the case of Carroll v. Houck & Campbell on the appeal from the circuit court; connected with that is a question of pleading. By section 12, art. 6, of the constitution and the amendment thereto, adopted in 1884, this court has jurisdiction "in all cases involving the construction of the constitution of the United States or of this state." In such cases, the appeal should be to this court, for it has exclusive jurisdiction in all such cases. Acts of 1883, p. 216, sec. 5. By the act of March 18, 1885 (Acts of 1885, p. 121), it is provided that where an appeal is taken to either of the courts of appeal, when it should have been allowed to this court, the court of appeals must transfer the cause to this, the supreme court. * * *

The court of appeals when speaking of its jurisdiction to determine the question made in respect of the constitution of the United States, says: "We have uniformly held that such a question, in order to be considered with reference to jurisdiction, * * * must be at least fairly debatable. The question, as here raised, is not debatable at all. It is set at rest forever, so far as this court is concerned, by our conclusions in the City of St. Louis v. Waterloo-Carondelet T. & F. Co., 14 Mo. App. 216." We cannot yield our assent to that disposition of the question. It is made the duty of this court to determine constitutional questions when they are fairly raised by the record, and that court is without jurisdiction in such cases, and hence its adjudications cannot set them at rest. This court will not give countenance to sham questions made for the mere purpose of giving this court jurisdiction of the whole case. But that is not the case here. Conceding to the city of Cape Girardeau the right, and the exclusive right to license ferry boats, and to make and collect reasonable wharf charges, and to regulate the landing of such boats; still the ferry is one between different states, and therefore concerns commerce between the states; and whether the city shall say that this inter-state traffic shall be carried on by one

person only, presents a question, to say the least of it, worthy of our consideration.

But the present inquiry is not as to the merits of these questions or as to either of them, presented by the appeal. The inquiry is, does the record in the case of *Carroll v. Campbell and Houck* as lodged in the court of appeals, present a question involving a construction of the constitution of the United States, or of this state, and we have seen that it does; indeed, as before stated, they are the only questions in the case; and it follows that the court of appeals is without jurisdiction to hear and determine the appeal.

Prohibition is a preventive, and not a corrective, remedy. Says High: "Where the proceedings which it is sought to prohibit have already been disposed of by the court, and nothing remains to be done either by the court or by the parties, the case having been absolutely dismissed by the inferior tribunal, prohibition will not lie." High, Ex. Leg. Rem., § 766. But where the want of jurisdiction appears on the face of the proceedings, prohibition will lie after judgment, if anything remains to be done under the judgment. Lloyd on Prohibition, 12; High, Ex. Rem., § 774. But in the present case the proceedings in the court of appeals are not at an end. The attachment for contempt has not been executed. The threatened judgment has been stayed only by the rule issued in the present case. Since, therefore, the relators have no other remedy, they are entitled to the writ of prohibition.

Our rule made on filing of the petition required the court of appeals to show cause why the case of *Carroll v. Houck and Campbell* should not be certified to this court and the question is, whether the writ should contain a clause requiring that appeal to be transferred to this court. In general, it is not the office of prohibition to undo that which has been done. Its office as before stated, is preventive. Lloyd, however, says, when speaking of this general rule: "But as the superior courts will interfere after execution, it follows that in such a case the writ must have a more extensive operation, and we find it so laid down in many of the old authorities." And further on he says "Prohibition will in such cases have an effect similar to that of a writ of restitution, and must not only command the person to whom it is directed to surcease, but also to revoke what he has already done." Lloyd on Prohibition, 67. The principle asserted by this author, may, we think, be applied to the present case. It should be applied with great care. But in the present case, the writ of prohibition is called into requisition, to some extent, in aid of our appellate jurisdiction. In view of this fact and since the writ must go, we conclude that as an incident to its general command, it may contain a clause requiring the court of appeals to transfer that case to this court.

With this result we need not consider the other questions dis-

cussed in the briefs. The rule heretofore issued to show cause is therefore made absolute.

BARCLAY, J., not sitting; the other judges concur.

6. Reaches only judicial acts and directed only to judicial tribunals.

STATE EX REL. WEST ET AL. V. COUNTY COURT OF CLARK COUNTY.

1867. SUPREME COURT OF MISSOURI. 41 Mo. 44.

SUGGESTION for a writ of prohibition.

HOLMES, J., delivered the opinion of the court.

This is a suggestion accompanied with an exemplification of the record of the county court of Clark County, filed in this court by the relators, supported by affidavit and praying for a writ of prohibition against the justices of the county court of said county; and against the commissioner appointed by the court to select a site for a seat of justice of said county, and the contractor with the court for the erection of county buildings at the place selected, to restrain them from further proceeding in the matter of the removal of the seat of justice of said county, on the ground that the court was exceeding its jurisdiction. * * *

It is clear that the county court did not proceed in accordance with the provisions of this act. A majority only and not "two-thirds of the legally registered voters," as expressly required, had voted for the removal. The proceedings in other respects were in direct contravention of the only law which gave them power over the subject. They were acting in an administrative capacity and as the agents of the county, and were bound to pursue the authority given by the statute, and to act within the scope given them by their limited and special power; and all persons dealing with the court, thus acting in behalf of the county, were bound to know the law that conferred the authority. *Wolcutt v. Lawrence County*, 26 Mo. 272; *Sheeley v. Wiggs et al.*, 32 Mo. 398.

A more difficult question arises whether prohibition is the remedy in such a case. The duties of the county courts are partly judicial, and in part merely administrative. *State v. Cooper Co. Ct.*, 17 Mo. 507. In the exercise of that portion of their jurisdiction which is judicial in its nature, as in matters of probate, accounts, guardians, minors, lunatics, apprentices, and the like, in which an appeal is allowed to the circuit courts, the county courts are a branch of the judiciary of the state, and as much state courts as the Circuit Courts. *Miller v. Iron Co.*, 29 Mo. 122. And if the court were exceeding its proper jurisdiction in matters of this kind, or were proceeding

judicially upon a misconstruction of a statute involving a question of jurisdiction in any suit pending between parties (though the county might be one of the parties) there is no doubt that a prohibition might be granted, at the discretion of the court, at the instance of any one of the parties, or even of a stranger to the suit. *Thomas v. Mead*, 36 Mo. 232; *Howard v. Pierce*, 38 Mo. 296; *Gould v. Gapper*, 5 East 345; *Tylstra v. Charlestown*, 1 Bay 382; *Washburn v. Phillips*, 2 Metc. 296; *Ex parte Smith*, 23 Ala. 94; *People v. Supervisors*, 1 Hill 201; *Reese v. Lawless*, 4 Bibb. 394, 2 Litt. Prac. 312.

But the office of a prohibition is to prevent courts from going beyond their jurisdiction in the exercise of judicial power; and not of ministerial or merely administrative function; and in a case where the court errs on a question of jurisdiction, or in the construction of a statute, in the exercise of such judicial power as an inferior court. It will not lie to restrain a ministerial act, as the issuing of an execution, or the levying of a tax to repair county buildings. *Ex parte Braudtlacht*, 2 Hill 367; *Clayton v. Heidelberg*, 9 Sm. & M. 623. Nor against ministerial officers, such as tax-collectors, commissioners to locate a county seat, or the like; nor to restrain the issuance of a commission by the governor. *State v. Allen*, 2 Ired. 183; *People v. Supervisors*, 1 Hill 195; *Ex parte Blackburn*, 5 Ark. 21; *Gill v. Taylor*, 4 McCord, 206. In these cases there is no question of a conflict of jurisdiction between different courts in the administration of justice, and there are supposed to be other adequate remedies for any injuries that may be done. In the case of the *King v. Justices of Dorset*, 15 East 594, the court refused a prohibition to restrain the justices from pulling down an old bridge for the purpose of building a new one as constituting a nuisance, and said that such an application of the writ had not been recognized in modern practice, where there was another remedy by indictment, though some ancient authorities were cited in support of it; and we have found no authority in this country that can be relied on for the application of the writ to a case of this kind. Even where a prohibition might be a proper remedy, the granting of it is subject to the discretion of the court.

In *Tetherow v. Grundy Co. Ct.*, 9 Mo. 117, it was decided that a writ of error would not lie from an order of the county court appointing commissioners to locate a permanent seat of justice, and it was distinctly intimated as the opinion of the court that such a proceeding was not a civil suit depending between parties; that such an order was not a final judgment on which a writ of error would lie; and that the plaintiff was not to be considered as a party to the proceeding as a suit; but it was said that "the circuit courts have a superintending control over the county courts, and if they exceed their powers or act contrary to their duty in proceedings in which writs of error will not lie, there are modes by which they can be restrained in conformity to the usages and principles of law." The court did not attempt to point out what those remedies were, nor is

it necessary that we should undertake to indicate them now. We may observe only that one mode of exercising that control is by the writ of mandamus in cases where that writ will lie; and if the court should exceed its powers in the exercise of that part of its jurisdiction which is judicial in its nature, a prohibition would unquestionably be the proper remedy.

In respect of the commissioner and contractor, it is apparent from the authorities that this writ must be refused. It is equally clear that the functions of the justices of the county court in this matter pertain to their administrative capacity, and not to the exercise of judicial power. The statute confers upon them a limited and special authority in proceedings of this nature. They derive their whole power from the statute. It is conferred upon them as representing the people of the county, whose agents they are in this business. The power given is made to depend upon the consent of at least two thirds of the legally registered voters of the county, and this consent is to be manifested in the mode prescribed by the act, and in no other way. It is not imperative upon the court to adopt the place selected by the commissioners, though the title deeds be approved by the judge of the circuit court, unless they believe the most suitable place has been selected; and this decision upon this matter, in the exercise of the discretion thus conferred, is to be evidenced by an order entered of record; and then the place so selected becomes the permanent seat of justice in the county. This is a direction as to the exercise of a power given by the statute, and the power must be exercised within the limits of the authority conferred and under the conditions imposed by the act. It is plain that the power given has not been pursued; the conditions have not been complied with; the consent of the voters has not been obtained in the manner prescribed; and it must follow that the proceedings were without the authority of the law, and are therefore null and void.

A prohibition not being the proper remedy, the demurrer will be sustained and the writ denied. The other judges concur.

See in accord *Home Ins. Co. v. Flint*, 13 Minn. 244; *People v. Supervisors*, 1 Hill (N. Y.) 195; *Burch v. Hardwicke*, 23 Grat. (Va.) 51; *Spring Valley, etc., Co. v. Bartlett*, 63 Cal. 245; *LaCroix v. County Com'rs*, 49 Conn. 591; *Hunter v. Moore*, 39 S. Car. 394; *Atkins v. Siddons*, 66 Ala. 453; *Cody v. Lennard* 45 Ga. 85; *Casby v. Thompson*, 42 Mo. 133; *State v. Laughlin*, 7 Mo. App. 529; *People v. District Court*, 6 Colo. 534; *Smith v. Whitney*, 116 U. S. 167.

But see *Fleming v. Commissioners*, 31 W. Va. 608; *Brazie v. Fayette Co. Com'rs*, 25 W. Va. 213; *State v. Commissioners*, 1 Mill (S. Car.), 55; *Ducheneau v. House*, 4 Utah, 363; *People v. Works*, 7 Wend. (N. Y.) 486; *Talbot v. Dent*, 9 B. Mon. (Ky.) 526.

STATE v. COMMISSIONERS OF ROADS.

1817. CONSTITUTIONAL COURT OF SOUTH CAROLINA. 1 Mill. 55,

12 Am. Dec. 596.

By court, CHEVES, J. On the fourteenth of April, 1814, the commissioners of roads for Christ Church Parish, on the application of Dr. A. F. Toomer:

"Resolved, That Dr. Jervey, John White, and R. T. Morrison, be appointed a committee to establish an old road through Captain Barksdale's plantation, for the benefit of Dr. A. V. Toomer." And on the fifth of August, 1816, they agreed to the following preamble and resolve: "Whereas Dr. A. V. Toomer, having complained to this board that Captain Thomas Barksdale, by frequently extending his fields, has turned him so far out of his way to the public road as to render it highly inconvenient for him to visit his neighbors, or pursue his public or private business. Therefore,

"Resolved, That the committee formerly appointed be, and they are hereby required to examine the acts of the legislature, authorizing the commissioners to lay out roads, etc., and report to this board at their next meeting." And on the eighth of October, 1816, they agreed to the following resolve:

"Resolved, That the old road, leading from Dr. Toomer's to the broad road, be re-established, and that Captain Barksdale be required to open and clear the same on or before the first of January next, and that the secretary be and is hereby required to communicate to Captain Barksdale the resolution of the Board."

In consequence of these resolutions, Mr. Barksdale filed a suggestion in the Court of Sessions for Charlestown district, alleging among other things, that the road in question was not a road laid out by commissioners of the public roads, but one established by his ancestors for their private convenience, and used by all other persons by the courtesy of his ancestors and himself; that it passed through his fields and that to continue it open would be greatly injurious to him and of little benefit to the public; that there existed a nearer and better road to the great high road to Charlestown; and that the closing of the road through his plantation would only increase the distance to other parts of the parish a quarter of a mile and a little more.

The facts were controverted by the commissioners of the roads, and much contradictory testimony was introduced through affidavits on both sides. On the suggestion and testimony recited, Mr. Barksdale obtained a rule on the commissioners of the roads, to show cause why a prohibition should not issue against them. Whereupon, in January term last, Mr. Justice Grimke presiding, the circuit court ordered "the rule to be discharged, unless the constitutional court

should be of opinion that the proceeding by prohibition is the regular proceeding, in which case the prohibition is granted, subject to the revision of the court, on the legality and merits of the case." From this order, Mr. Barksdale appealed to the Constitutional Court; and we are now to consider, 1. Whether this court has power to grant a prohibition against the commissioners; 2. Whether, if it have the power, it ought to grant it, under the circumstances of the case.

1. On the first question the counsel concerned in the case have concurred, or at least their difference of opinion was so inconsiderable that I have been unable to discover where it lay. They concurred in opinion that the court had power to grant the prohibition. Notwithstanding this agreement of adverse counsel, it seems the authority of the court has been doubted both at the bar and on the bench. The immediate grounds it is believed, on which the doubts have been entertained, and probably sustained the determination of the judge who presided in the circuit court, is, that the books say a prohibition is a writ issuing out of the superior courts, "directed to the judges and parties of an inferior court, commanding them to cease from the prosecution of a suit, upon a suggestion that either the cause originally, or some collateral matter therein, does not belong to that jurisdiction, but to the cognizance of some other court;" 3 Bl. Com. 112; and this is certainly the language used most invariably in the books. Indeed, in one it is said: "It is now most usually taken for a writ which lieth for one who is impleaded in the court christian for a cause belonging to the temporal jurisdiction; Jacob's Law Dict., tit. Prohibition, 5 Vol. 316, who cites Cowell—and hence it is inferred that the writ of prohibition can only be directed to a court, or, at most to a body or person exercising some judicial function. The accuracy of this opinion may, however, be reasonably disputed. While the principles in which the writ appears to have originated seem to prove that it may issue in other cases, precedents are not wanting to show that it has actually issued in such cases. It is said "the reason of prohibition in general is, that they preserve the right of the king's crown and court, and the quiet of the subject." 5 Bacon's Abr., tit. Prohibitions, p. 647. And one general ground of prohibitions is, that though the subject matter of suit is within the proper jurisdiction of an inferior tribunal, yet that in some collateral or incidental matter it is proceeding contrary to the common law, or some statutory provision. Thus it would seem, if we pursue these principles, that the courts have authority by this proceeding to supervise the execution of the laws, not merely by keeping inferior tribunals within their proper jurisdiction, but also by enforcing a correct execution of the laws, as well the common as the statute law. To the generality of this rule, there will, of course, be exceptions pointed out by the nature and object of this proceeding. If, then, the authority of these courts be thus extensive, and such be the ob-

jects of this proceeding, what reason can there be to limit its operation merely to the regulation of inferior courts? Why should it not extend to other functionaries who are charged with the execution of the laws, and to corporate bodies whose existence and whose privileges are an emanation of the sovereign authority?

Accordingly, we do find the writ of prohibition directed to persons, whose character or function had little or nothing of a judicial nature in them. Thus, prohibition has been a common remedy to restrain the excess or abuse of visatorial authority in cases of eleemosynary corporations; Woodson, 1 Vol. 472, 473, 479, 483, 484. There is, it is true, in the duty of the visitors of these institutions, a power to determine in some cases, on the rights of individuals, in relation to the corporation of which they are the visitors, but they do this more in the character of private trustees, than as public judges. They are appointed by the founders, or their authority results to them as the heirs of the founders: I Woodson 474.

It's impossible to imagine a tribunal less resembling those which have been usually and properly denominated courts, than would be the forum, if so we may be permitted to speak, of a visitor of one of these institutions. Less of the judicial character, or a more shadowy resemblance of judicial functions, cannot be conceived to exist, yet they are usually restrained by proceedings in prohibition, when they exceed or abuse their authority.

From this example alone, and the cases which establish it are numerous, it will appear that prohibitions are not exclusively directed to courts, and that, if judicial functions in those to whom they are directed be necessary at all, as their foundation, they need not be very extensive or very strongly marked. But, I am of opinion, that in our habit of thinking, on this subject, we have mistaken the derivative for the original. The origin of this proceeding, as we have seen from the authorities quoted, was to secure the sovereign rights, and preserve the public quiet; it was an emanative of the great executive authority of the king, delegated to his courts, and particularly to the king's bench: 1 Bl. Com. 481, 482; one of his prerogative writs, necessary to perfect the administration of his justice, and the control of subordinate functionaries and authorities. By the writ of mandamus he commanded what ought to be done, and by the writ of prohibition he forbade what ought not to be done, in cases where the general authority was not denied, or not intended to be resumed. The writ of *quo warranto* on the other hand was designed to restrain and punish an original usurpation, or to seize again into the hands of the crown the franchise, or authority in controversy, because it had been forfeited. It is not intended to say that the writ of *quo warranto* may not be used to try the validity of a certain franchise, or authority, at the instance

of an individual, where the attorney shall clothe the proceeding with the authority of the state; but it will, nevertheless, not be an adequate remedy for the citizen if it were for no other reason than that he will hold it at the will of the attorney general. Besides, as the object of the *quo warranto* is always the destruction of the franchise, or authority, it will not embrace a case where such judgment ought not to be pronounced; as, for example, where there has been an actual, but an unintentional excess of a chartered privilege, the judgment would not surely be, that it should be seized; yet the individual would be entitled to relief. Again, where a by-law should unquestionably be correct in its terms and provisions, but should be erroneously applied or executed by the subordinate officers of the corporation, there could not be a judgment of forfeiture, but the individual aggrieved would be entitled to a remedy.

Though the writ of *quo warranto* may sometimes supply a private remedy, it was designed for a public prosecution, and will not, in practice, be found to supersede the utility or necessity of the writ of prohibition. From this remark will be excepted cases under the statute 9 Anne, Ch. 20, where the writ of *quo warranto* was granted expressly, and is peculiarly proper to afford private relief, it being thus evident that the proceeding by prohibition in principle is not confined to the restraint of inferior judicial tribunals, let us see whether there are not precedents to the same effect. In Fitzherbert's *Natura Brevium*, p. 21, it is said, that tenant by fealty, and certain rent shall, in the case there stated, have the writ of *ne injuste vexes* directed to the lord, commanding him not to distrain for other services than of right he ought to do; and it is said that this writ in itself is a prohibition to the lord; and again, that "the process in this writ is attachment, prohibition, etc.; and though it be called the writ of *ne injuste vexes* it probably received this name because it was sued out of the chancery as a special writ, at a time when original writs to suit each particular case were obtained with almost as much facility as pleadings are now adapted to particular cases. The origin which Fitzherbert assigns to it proves this; he says: "This writ is founded upon the statute of Magna Charta, c. 10, which willeth that no man be distrained to do greater service for a knight's fee, nor for any other freehold, than is therefor due." If a like foundation for the application of the writ of prohibition be desired, it will be found in many cases in the second section of the ninth article of the constitution of this state, though it is obvious that this provision of Magna Charta did no more than give a specification to the right of the subject, and did not confer the authority of the court to grant it, which existed before under its general powers.

In Fitzherbert's *Nat. Brev.*, p. 70, it is said: "A person who is sued in the spiritual court may purchase a writ, which is called

indicavit; which writ is a prohibition," etc. This last authority is cited merely to show the special names which writs of the same nature often assumed as they happen to be adapted to particular cases. So in the writ of waste, at the common law, Fitzherbert's Nat. Brev. 126, those who committed waste were punishable by prohibition and attachment. In the case of *Jefferson v. Bishop of Durham*, 1 Bos. & P. 120, 121, Chief Justice Eyre says: "At common law the proceeding in waste was by writ of prohibition from the court of chancery, which was considered as the foundation of a suit between the party suffering by the waste and the party committing it. If that writ was obeyed, the ends of justice were answered; but if that was not obeyed, and an *alias* and *pluries* produced no effect, then came the original writ of an attachment, out of chancery, returnable in court of common law, which was considered as the original writ of the court. The form of the writ shows the nature of it. It was the original writ of attachment which was, and is, the foundation of all proceedings in prohibition."

Thus we see very clearly that proceedings in prohibitions were applicable to other cases than those in which inferior tribunals were to be restrained. But notwithstanding these authorities, Fitzherbert, Nat. Brev. tit. Prohibition, like the authorities who have followed him speaks of this writ only as one directed to inferior judicial tribunals. We must, then, consider the writ of prohibition, originally and peculiarly so-called in the nomenclature of the chancery, as distinguished from other like writs, and from other proceedings by prohibition. In this way the authorities may be reconciled and made intelligible; and we will be authorized to apply the writ according to the principles and commensurately with the purposes for which it appears to have been designed. Writs of waste and writs of *ne injuste vexes* and other like writs, in which the proceedings were by prohibition, have indeed, long since ceased in our practice; and these examples, as precedents in point, would be absurd and ridiculous; nor can we find the writ of prohibition issuing from the *officina brevium*, directed to commissioners of roads. But it is the peculiar and admirable property of the common law, that it authorizes its dispensers to frame their judgments upon the analogy of cases and principles to the new and continually varying circumstances, and to the present interests and conveniences of the country. We should lose the spirit and enjoy nothing but the black letter of the common law, if, under the circumstances of our country, so entirely different from England, at any period, we should not allow ourselves to apply its remedies and its processes with some little variation.

The English courts have themselves done this on the very subjects we are considering, for we should in vain seek in the ancient repositories of writs for a prohibition, in some of the cases which the practice of our own times has furnished. This proceeding in modern

times, seems to have fallen into disuse in controversies between individuals, as in cases of waste and the like; and its use, on the other hand, has been extended to public functionaries and corporate bodies, as we have seen by the examples quoted; and it would seem, is applicable to all such cases where the object is not the destruction of the franchise or authority controverted. Now, to apply this reasoning and these authorities to the case before us.

The commissioners of the roads are public functionaries, invested with judicial powers. They decide between citizen and citizen, in relation to the freehold and transfer, without compensation, at their discretion, the property of individuals, to the uses of the public. They cite parties before them, hear witnesses, give judgments, and enforce their judgments by high penalties. They seem to be much more clearly and properly objects of these proceedings than visitors of eleemosynary corporations; and I am quite satisfied that the proceeding by prohibition is a proper proceeding in this case.

2. The second question depends principally upon the fact, whether this be an old road, which was originally laid out by the commissioners of the roads. The authority under which the commissioners in this case have acted, is the thirteenth section of the act, entitled "an act to alter and amend the act respecting the high roads and bridges," etc. Pub. Laws 446. On this question of fact there is much contradictory testimony, on which the court would find it difficult to decide; and it is a question peculiarly proper for the decision of a jury of the vicinage. I am, therefore, of the opinion that the plaintiff should declare in prohibition in order that the question may be submitted to a jury. A majority of my brethren at least, as to the points decided, concur in this opinion; the judgment of the court, therefore, is, that the order of the circuit court be reversed, that the rule for a prohibition be made absolute, and that the plaintiff do declare in prohibition: I Saund. 136, note 1.

(Dissenting opinion on another point omitted.)

7. Excess or defect of jurisdiction.

WILKINSON v. HOKE, JUDGE.

1894. SUPREME COURT OF APPEALS OF WEST VIRGINIA. 34 W. Va. 403; 19 S. E. 520.

HOLT, J.—On the thirty-first day of January, 1893, the plaintiff (an infant suing by his next friend) brought in the circuit court of Taylor County, an action of trespass on the case against the defendant, Ashby J. Wilkinson, for assault and battery, laying his

damages at \$3,000. The defendant appeared and entered the plea of not guilty; and at the September term the case was tried by jury, and a verdict of \$25 was found for the plaintiff. Upon this verdict the court rendered judgment that plaintiff recover the damages found by the jury, and his costs, but did not enter of record that the object of the action was to try a right, besides the mere right to recover damages for the trespass, nor enter of record that the trespass of grievance was willful or malicious, as must be done where the verdict be found for the plaintiff for less damages than \$50, and for which a personal action might be brought, and prosecuted to judgment in a justices' court. See Code, c. 138, § 6. In this case, suit could have been brought in a justice's court, and a judgment rendered to the extent of \$300 (12 times the amount herein found) and in such cases the amount found furnishes the true criterion. See code, c. 50, § 8-11. The judgment entered against defendant for costs exceeded the legitimate powers of the court, no fact appearing on the record to justify it, as must appear by record in such cases, where such court exceeds its legitimate powers, although, having jurisdiction of the subject matter in controversy, a writ of prohibition lies as a matter of right; determined, not by the amount in controversy, but by the excess of power. See section 1, c. 110, Code and section 3, art. 8, Const. (Code, (Ed. 1891) p. 37). And, the term being ended, the matter has passed into a thing finally adjudged, and is therefore beyond the power of the court to alter or amend. And if, on motion to quash the present execution, the court were to quash the same, as in a proper case, it has the power to do, we are, in this case, to take it for granted that it would not have done so, from the answer and return made to the rule awarded to show cause why the writ of prohibition should not issue. But, if we are not mistaken in the views expressed above, that would be immaterial, for the writ goes as a matter of right, where the court exceeds its legitimate powers; and the statute expressly takes away such power not simply in the case where such trespass may have been in fact willful and malicious, but in the case where such fact is not entered of record, taking for granted that, for the object here had in view, that which does not appear by the record does not exist. In such a case, a judgment for the costs is by the statute, prohibited directly and positively. "Costs were not recoverable at common law. It is by virtue of the statute, alone, that any judgment for costs, *eo nomine*, can be rendered in favor of either party." *West v. Ferguson* (1861) 16 Grat. 270; 3 Bl. Com. 399 (Hammond's ed.); 3 Comyn 223; 3 Co. Litt. 11, note; *Pilfold's case*, 10 Coke 116. The first law giving costs to a defendant is said to be the statute of Marlebridge (1268) c. 6. Our statute (§ 8, c. 138) which gives costs generally, excepts this case expressly, as one where it is otherwise provided by its direct and

partial prohibition; not that a judgment for costs in the given case may be rendered, unless objections be made, but it is peremptory that the plaintiff for whom a verdict is found for less damages than \$50, shall not recover, in respect to such verdict, any costs, unless the court enter of record that the said grievance or trespass was willful or malicious. It is true that the judgment has been entered, and is now final, and that the circuit judge is not a ministerial officer of his court; yet it appears that the execution issued has not been satisfied or returned, and the circuit court and the judge in vacation, has control over its process, both *mesne* and final, and the ministerial officers of the court are but parts of the machinery. *Ingersoll v. Buchannon*, 1 W. Va. 181; 2 Spel. Extr. Rem. § 1720; *Hutson v. Lowry*, 2 Va. Cas. 42; *Bodley v. Archibald*, 33 W. Va. 229, 10 S. E. 392. In such a case a writ of prohibition is a proper proceeding to arrest the execution of a judgment rendered without authority (*West v. Ferguson*, 16 Grat. 270;) for no writ of error or other adequate remedy, is available to afford the redress to which the party is entitled for such excess of power. "It is the means by which a superior tribunal exercises its superintendence over the inferior, and keeps it within the limits of its rightful jurisdiction" (*High Ex. Leg. Rem. § 768*,) and the constitution gives this court original jurisdiction (art. 8, § 3). Here there is no practical difficulty, for the judgment for costs is distinct, from the main judgment, and is stated separately in the execution. For the proceeding in such cases see *Miller v. Marshall*, 1 Va. Cas. 158; *Mayo v. James*, 12 Grat. 17, 26; and §§ 1, Ch. 110, code. On the subject generally see *Brazie v. Commissioners* 25 W. Va. 213; *Fleming v. Guthrie*, 23 W. Va. 1, 9 S. E. 23; *Fleming v. Commissioners*, 31 W. Va. 608, 8 S. E. 267; *County Court v. Boreman*, 34 W. Va. 87, 11 S. E. 747; *McGoniha v. Guthrie*, 21 W. Va. 134; *Buskirk v. Judge*, 7 W. Va. 91; *County Court v. Armstrong*, 34 W. Va. 326; 12 S. E. 488; *Alderson v. Commissioners*, 31 W. Va. 633; 8 S. E. 274; *Manufacturing Co. v. Carroll*, 30 W. Va. 534, 4 S. E. 782. For the reason given we are of opinion, that the matters alleged in the answer and return to the rule are insufficient, and that the writ should be awarded as prayed for.

MINES D'OR DE QUARTZ MOUNTAIN SOCIETE
ANONYME ET AL. v. SUPERIOR COURT OF
FRESNO CO.

1891. SUPREME COURT OF CALIFORNIA. 91 Cal. 101; 27 Pac. 532.

DEHAVEN, J.—The petitioners are non-residents of the state of California, and an action against them is pending in the superior court of Fresno County, in which that court made an order directing

that the summons therein be served upon the petitioners by publication. Thereafter the petitioners appeared specially in the action, and moved to vacate and set aside that order upon the alleged ground that the action is *in personam*, and therefore not one in which summons by publication is authorized. The motion was denied. After this petitioners again entered a special appearance in said action, and moved for an order staying all proceedings therein, until the summons should be personally served upon petitioners, or until such time as they should enter their general appearance. This motion was also denied and the petitioners now ask that a writ of prohibition issue out of this court commanding said superior court to refrain from further proceeding in said action until petitioners shall enter their general appearance therein, or are personally served with the summons in the action.

We do not deem it either necessary or proper to determine at this time whether the action now pending against petitioner in the superior court is one in which the summons can legally be served by publication. That court has jurisdiction of the subject matter of the action, and whether it has jurisdiction over the persons of petitioners is a question which it must determine for itself before entering judgment in the action, and which it has the same authority to pass upon as any other question of law or fact which may arise during its progress, and, if in the decision error shall be committed to the prejudice of petitioners, the law affords them a plain, speedy and adequate remedy by an appeal from any judgment which may be entered against them. *Agassiz v. Superior Court*, 27 Pac. Rep. 49, and cases cited. Application for writ denied.

QUIMBO APPO v. PEOPLE.

1860. COURT OF APPEALS OF NEW YORK. 20 N. Y. 531.

WRIT of error to the Supreme Court. Quimbo Appo was tried and convicted of murder, and sentenced to be executed therefor, by a court of oyer and terminer held in and for the city and county of New York, in April, 1859. The court adjourned *sine die* on the 16th of June following:

On the first Monday of October, in the same year, a court of oyer and terminer was held in and for the same city and county, before Mr. Justice Roosevelt, and on the 17th of October, Appo, made an application to the last mentioned court to set aside his conviction and sentence and grant him a new trial; affidavits of injustice done him on his trial and of newly discovered evidence, etc., were filed with the motion.

The district court denied the power of the court to entertain or grant such a motion and declined to answer it on the merits. The court affirmed its power and announced its intention to grant the motion. The district attorney thereupon sued out an alternative writ of prohibition, addressed to Appo and the court, forbidding the exercise of this jurisdiction. The writ was returnable at the general term of the supreme court on the first Monday of December 1859. On the return day, the court, on argument, rendered judgment, awarding a prohibition absolute, from which judgment Appo brought error to this court.

The opinion of the court was delivered by

SELDEN, J.—The first question to be considered is, whether the writ of prohibition was the proper remedy, assuming that the court of oyer and terminer had no authority to grant a new trial upon the merits after conviction and sentence for the crime of murder.

The office of this writ is, to restrain subordinate courts and inferior judicial tribunals of every kind from exceeding their jurisdiction. It is an ancient and valuable writ, and one the use of which in all proper cases should be upheld and encouraged, as it is important to the due and regular administration of justice that each tribunal should confine itself to the exercise of those powers, with which, under the constitution and laws of this state, it has been intrusted.

But it is said that when the inferior court or tribunal has jurisdiction of the action, or of the subject matter before it, any error in the exercise of that jurisdiction can neither be corrected nor prevented by a writ of prohibition.

It is true that the most frequent occasions for the use of the writ are where a subordinate tribunal assumes to entertain some cause or proceeding over which it has no control. But the necessity for the writ is the same where, in a matter of which such tribunal has jurisdiction, it goes beyond its legitimate powers; and the authorities show that the writ is equally applicable to such a case. Mr. Jacob, in treating of this writ, after saying that it may issue to inferior courts of every description, whether ecclesiastical, temporal, military or maritime, whenever they attempt to take cognizance of causes over which they have no jurisdiction, adds: "or, if, in handling matters clearly within their cognizance, they transgress the bounds prescribed to them by the laws of England, as where they require two witnesses to prove the payment of a legacy." (Jac. Law Dict. tit. Prohibition.)

In the case of *Darby v. Cosens* (1 Term R. 552) the defendant who was the vicar of Parish of Long Burton, had sued Darby in an ecclesiastical court for tithes, that being an action appropriate to the jurisdiction of that court; but the defendant having set up a *modus* by way of defense, an issue was presented which the eccle-

siastical court had no authority to try—still, as it assumed to proceed with the case, upon application to the court of king's bench a writ of prohibition was issued.

The precise objection made here was taken in the case of *Leman v. Goulty*, (3 Term R. 3) where certain church wardens were cited in the bishop's court to exhibit on oath an account of the moneys received and paid by them. Objections being made to one or two items of the account, the bishop required them to pay a certain amount, and upon their refusing was proceeding still further with the case when a rule was obtained in the court of king's bench to show cause why a writ of prohibition should not issue; and the counsel in showing cause insisted that as the Bishop's court had original jurisdiction of the cause, the error should be corrected upon appeal, and was not a ground for a writ of prohibition; but the court allowed the writ and Lord Kenyon admitted that for a mere error in giving judgment which the court had power to render, the writ would not lie, and said: "Now in this case, with respect to the compelling of a production of the church warden's accounts, the spiritual court had exclusive jurisdiction; but there their authority ceases, and everything which they did afterwards was an excess of jurisdiction for which a prohibition ought to be granted."

These cases prove that the writ lies to prevent the exercise of any unauthorized power, in a cause or proceeding of which the subordinate tribunal has jurisdiction, no less than when the entire cause is without its jurisdiction. The broad remedial nature of this writ is shown by the brief statement of a case by Fitzherbert. In stating the various cases in which the writ will lie, he says: "And if a man be sued in the spiritual court, and the judges there will not grant unto the defendant the copy of the libel, then he shall have a prohibition, directed unto them for a surcease," etc., until they have delivered the copy of the libel, according to the statute made Anno 2 H. 5. (F. N. B. Title Prohibition.)

This shows that *the writ was never governed by any narrow technical rules, but was resorted to as a convenient mode of exercising a wholesome control over inferior tribunals.* The scope of this remedy ought not I think, to be abridged, as it is far better to prevent the exercise of an unauthorized power than to be driven to the necessity of correcting the error after it is committed. I have no hesitation therefore, in holding that this was a proper case for the use of the writ, if the supreme court was right in the conclusion to which it arrived at the general term. * * *

(The court held that the oyer and terminer in the several counties of the state is a continuous and permanent court and its successive sessions are terms of the same and not distinct tribunals.

That said court has no power to grant a motion for a new trial, upon the merits after the conviction for a felony.)

Opinions, CLARK, J. (concurring) and BACON, J (dissenting), are omitted.

STATE EX REL. BUTLER v. WILLIAMS, JUDGE.

1887. SUPREME COURT OF ARKANSAS. 48 Ark. 227; 2 S. W. 843.

PETITION for prohibition.

SMITH, J.—On the fourth of August, 1885, in Desha circuit court, the cause of J. W. Whitehill, plaintiff, against J. R. Butler, defendant, was tried before the Hon. John A. Williams, circuit judge, and a jury and a verdict and judgment were given for the defendant. On the sixth of the same month the plaintiff moved for a new trial. This motion had not been disposed of when the court adjourned over until the eighth of December following. On the day last mentioned the circuit judge was not in attendance, being engaged in holding the Jefferson circuit court. On the ninth of December a special judge was elected, who adjourned the court over, from time to time, until the 23d of January 1886, when the regular judge appeared, set aside the judgment previously entered in the above entitled cause, and ordered another trial. At a subsequent term the defendant in the action moved the court to strike the cause out of the docket upon a suggestion that the judgment had become final before the court undertook to set the same aside. This motion was denied. The defendant in that action now prays the writ of prohibition to prevent the circuit judge from taking further jurisdiction of the cause; and the question is whether the Desha circuit court was legally in session on the twenty-third of January, 1886.

It is not the meeting of the judge and officers of the court at the county seat that constitutes a court, *but that meeting must be at a time authorized by law.* *Brumley v. State*, 20 Ark. 77; *Ex parte Osborn*, 24 Ark. 479. The terms of the circuit court are prescribed by statute. It is provided, however, that "special adjourned sessions of any court may be held in continuation of the regular term, upon its being ordered by the judge or court in term time, and entered by the clerk on the record." *Mansf. Dig.* §§1476, 1481. There is no such thing known to our laws as two circuit courts held in the same circuit at the same time, one presided over by the regular judge, and the other by a special judge. Suitors are entitled to have their causes tried before the circuit judge, unless he

is disqualified, or unable to preside from causes beyond his control. It was lawful for the Desha circuit court to adjourn to a distant day; but when that day arrived and he was detained by his judicial duties in another county of his circuit, the adjourned session necessarily failed; for there is no power to supply his place temporarily, by a special election by the attorneys in attendance,—his absence for this cause not being such an inability to continue to hold the court as is contemplated by section 21 of article 7 of the constitution of 1874. We are also inclined to think that, if the circuit court of Jefferson county had not been in session, the adjourned session would have failed for want of a judge, the court not having been organized on the day to which the adjournment was had by the election of a special judge. But this was not a new term but a continuation of the old one. But on this point it is not necessary to express any decided opinion. Prohibition is an extraordinary remedy, and the writ will not be granted unless the defendant has objected to the jurisdiction of the inferior court, and his objection has been overruled. *Ex parte* City of Little Rock, 26 Ark. 52, and cases cited; *Smith v. Whitney*, 116 U. S. 167, 6 Sup. Ct. Rep. 570. We regard the motion by the defendant to dismiss the cause for want of jurisdiction as satisfying this requirement. It was in fact all he could do. Let the writ go.

See also *State v. Laughlin*, 9 Mo. App. 486; *People v. Circuit Court*, 173 Ill. 272; *State v. Allen*, 47 La. Ann. 1600; *Turner v. Mayor, etc.*, of Forsythe, 78 Ga. 683; *Pacific, etc., R. Co. v. Superior Ct.*, 79 Cal. 103; *Hanger v. Keating*, 26 Ark. 51.

But see *State v. Wilcox*, 24 Minn. 143; *State v. Aloe*, 152 Mo. 466.

PEOPLE EX REL. SPRAGUE ET AL. V. FITZGERALD ET AL.

1897. SUPREME COURT OF NEW YORK, APPELLATE DIVISION.
15 App. Div. 539; 44 N. Y. Supp. 556.

APPEAL from surrogate's court, Richmond county.

Prohibition by Edward Sprague and another as administrators of David H. Journeay, deceased, against Thomas W. Fitzgerald, district attorney, and acting surrogate of the county of Richmond, and Mary L. Englebrecht. From an order directing a writ of prohibition to issue restraining and prohibiting said Fitzgerald, as acting surrogate, from taking any proceedings or issuing any order removing relators from their office as administrators, said Fitzgerald, appeals. Affirmed.

HATCH, J.—This proceeding was begun by the issue of an alternative writ of prohibition, which, upon the hearing at special term

was made absolute. The writ operated to restrain the acting surrogate from enforcing the decree providing for the removal of the administrators upon an *ex parte* application, and the appointment of a particular person in their stead. We have already considered the force and effect of this decree, and reached the conclusion that the same in this respect is void. *In re Englebrecht* (not yet officially reported) 44 N. Y. Supp. 551. It is well settled that a writ of prohibition will issue to prevent a judicial tribunal from exercising power over matters not within its cognizance or exceeding its jurisdiction in matters of which it may take cognizance. *People v. Nichols*, 79 N. Y. 582; *Quimbo Appo v. People*, 20 N. Y. 531; *Thomson v. Tracy*, 60 N. Y. 31. As the contemplated action was the enforcement of a void decree, it is proper that the writ should issue in restraint of it.

The order should therefore be affirmed, with \$10 costs and disbursements. All concur.

See also *Washburn v. Phillips*, 43 Mass. 296; *Roper v. Cady*, 4 Mo. App. 593; *St. Louis, etc., R. Co. v. Wear*, 135 Mo. 230; *State v. Hopkins*, Dud. (S. Car.) 101; *Brown, Ex parte*, 58 Ala. 536; *State v. McDowell*, 43 La. Ann. 1193; *Broder v. Superior Ct.*, 103 Cal. 124; *Arnold v. Shields*, 5 Dana (Ky.), 18; *Goldsmith v. Owen*, 95 Ky. 420; *Morrison, In re*, 147 U. S. 14.

Jurisdiction of subject matter. *Blackburn, Ex parte*, 5 Ark. 21; *State v. Allen*, 45 Mo. App. 551; *State v. Judges*, 40 La. Ann. 771; *James v. Stokes*, 77 Va. 225; *Ray, Ex parte*, 45 Ala. 15.

Jurisdiction of person. *People v. Inman*, 74 Hun (N. Y.) 130; *People v. Judge Wayne Co., etc.*, 26 Mich. 100.

8. Misconstruction of law or statutes affecting jurisdiction.

HOME V. EARL CAMDEN ET AL.

1795. HOUSE OF LORDS. 2 H. Blackstone, 533.

THE judgment of the court of Common Pleas (*ante*, vol. 1, 487) having been reversed by the court of King's Bench, (4 Term. Rep. B. R. 382) a writ of error was brought in parliament, and fully argued on grounds in a great measure similar to those taken in the courts below. After which, on the motion of Lord Thurlow, the following question was proposed to the judges, viz.—

“Whether the declaration is sufficient in law to bar the defendants from proceeding against John Pasley to compel him to bring in the account of the sales of the ship and cargo, together with the proceeds of such parts thereof as may be in his hands, power or possession?”

In answer to which the unanimous opinion of the judges was thus delivered, by

LORD CHIEF JUSTICE EYRE. The judges have conferred upon the questions which your lordships have been pleased to propose to them, and are unanimously of the opinion that the declaration in this cause is not sufficient in law to bar the defendants from proceeding against John Pasley, to compel him to bring in the account of the sales of the ship and cargo, together with the proceeds of such parts thereof as may be in his power, hands or possession. I will open to your lordships briefly the grounds in law which appear to me to warrant this opinion. A few preliminary observations upon the nature of this proceeding, may in some degree elucidate the subject. This is an action, in the form of it, to recover damages for proceeding after a writ of prohibition has been obtained, and delivered to the party defendant. Probably in the early part of our legal history, when the struggle for jurisdiction between the temporal and ecclesiastical courts was violent, and the jealousy of the encroachment of the ecclesiastical jurisdiction upon the temporal was eager, this was a proceeding effective to the whole extent of its form. In modern and in better times this form of proceeding is used for the mere purpose of subjecting the grounds in law, upon which any particular prohibition is sought to be obtained from any temporal court, to a judicial examination in the most solemn manner. How it was moulded to this purpose, will be seen in an instant, if it be considered that in this form of action two things would be necessary to be proved, the first, that the defendant had proceeded in the court of peculiar jurisdiction after the writ of prohibition had been delivered, the second, that this proceeding was an injury to the plaintiff. But the plaintiff would have no ground to complain of the proceeding after a writ of prohibition delivered, as an injury to him, (though it might be a contempt for which the party might be amenable to the king) unless he could show that the writ had issued properly, and that he had a just right to claim the benefit of it. This goes at once to all the merits of the prohibition which is supposed to have issued, and makes the legal ground of it the gist of the action.

Such being the nature of this proceeding it becomes a convenient mode of trying whether a prohibition ought to issue, and it is made practicable by considering all that relates to the contempt, incurred by proceeding after the writ had actually issued, as mere form, and the damages nominal. Accordingly in modern times when prohibitions are applied for to the temporal courts, and the parties applying suggest grounds either of law or fact, for obtaining the writ, which appear to the court so doubtful as to be fit to be put in a course of trial, the party applying is directed to declare in prohibition, that is, to institute a feigned action, in the form of that

which is now under consideration; in which action, in the shape of a question, whether such prohibition as is moved for ought to have been granted, the real question, namely whether such a prohibition ought to be granted, will be solemnly considered and determined, if the parties think fit, as in the present instance, in the *dernier resort*, by your lordships. If any man, who hears me, thinks that he observes something of obliquity in this proceeding, let him look to the effect of it, and he will be satisfied. So long as the temporal courts direct parties to declare in prohibition, a prohibition cannot arbitrarily issue nor upon any but the most solid and substantial grounds, and the balance in which are to be weighed all the different jurisdictions, in which the public justice of the country is administered to the people, will be holden by your lordships. In the present case the plaintiff has declared in prohibition, and the question proposed by your lordships to the judges goes to the very foundation of his suit; it is tantamount to a question, whether upon the case stated in this declaration, a prohibition to the effect of the prohibition stated in this declaration, ought now to issue to the Lord Commissioners of Prizes, to restrain them from issuing the process of monition, to compel John Pasley to bring in an account of the sale of the ship and cargo mentioned in the proceedings, together with the proceeds of such part thereof, as may be in his hands, power or possession. The ground made by this declaration for a prohibition to restrain the prize court from issuing process to compel the bringing in the account of sales and proceeds of the ship and cargo, is a supposed contravention of the prize acts now in force, particularly the statutes of the 12th and 21st of his present majesty. *It is assumed, that if a court of peculiar jurisdiction will proceed contrary to the provision of the statute law of the realm (and that if such a court misinterprets any of these provisions, it does proceed substantially contrary to them,) this is a good ground for a prohibition.* If it were necessary to a decision of your lordship's question, that the judges should affirm or deny this proposition in the extent in which I have stated it, we should have found ourselves obliged to request the indulgence of farther time for the examination of the terms of the proposition. It undoubtedly belongs to the king's temporal courts to restrain courts of peculiar jurisdiction from exceeding the bounds prescribed to them; and by far the greater part of the instances in our books, in which prohibitions have issued, are cases of plain excess of jurisdiction. But some of the instances go beyond an excess of jurisdiction, and seem rather to fall under the head of wrong and injustice done to the party, by refusing him in the course of a proceeding strictly within the jurisdiction, some benefit or advantage to which the common or statute law entitled him, perhaps in opposition to the civil or canon law, by which the general proceedings of those courts are regulated. The case of a

lease offered to be proved in an ecclesiastical court by one witness, and rejected because by their law two witnesses are necessary, and the case of a copy of the libel, which by the statute law they are required to give, demanded and refused, are among those instances. On the other hand, it must be admitted that the misinterpretation of either the common or statute law, in a proceeding confessedly within the jurisdiction of those courts, and where they are bound to exercise their judgment upon the one or the other, seems to be rather a matter of error, to be redressed in the course of the appeal which the law has provided, than a ground for a prohibition. The answer to this is, that the king's temporal courts, and your lordships in the last instance, are, by the constitution of this country, to declare the common and expound the statute law, and that the possibility of two different rules prevailing upon the same law, one in the king's temporal courts, and the other in the courts of peculiar jurisdiction, ought not to exist, and is effectually prevented without any unreasonable interference, or breaking in upon the courts of peculiar jurisdiction, by the temporal courts issuing their prohibitions in every such case. But this is no more than saying "*proceed to the very extent of your jurisdiction without interruption from us, only remembering that you are always to declare the common law as we declare it, and that when any question arises touching the exposition of the statute law, if the subject is originally of temporal jurisdiction and comes incidentally before you, it is to be expounded by you as we expound it; or if the statute concerns your proceedings only, you shall expound it as we shall say it ought to be expounded, when the question is brought before us in prohibition.*" I understand the claim of the temporal courts, as it is stated in the famous controversy in the beginning of the reign of James the First, is to issue prohibitions to this extent; and though some of the cases in our books have been ably distinguished at the bar, and made reducible to the head of excess of jurisdiction, yet we find traces of continual claim to issue prohibition in the instances above mentioned. In the case of *Brymer v. Atkins*, (Ante Vol. 1, 164) in the court of common pleas it is stated broadly and distinctly asserted; and in *Full v. Hutchins*, (Cowper 422) Lord Mansfield in delivering the opinion of the court, plainly alluded to it in the following passage: "where matters which are triable at common law, arise incidentally in a cause, and the ecclesiastical court has jurisdiction in the principal point, this court will not grant a prohibition to stay trial. For instance, if the construction of an act of parliament comes in question, or a release be pleaded, they shall not be prohibited, unless the court proceed to try contrary to the course and principles of the common law, as if they refuse one witness, etc.; and this is expressly laid down by Lord Hale, 2 Lev. 64, *Sir W. Juxon v. Lord Byron*." But it must be remem-

bered that in the argument of this very case in the court of King's Bench, this doctrine was questioned by one of the learned judges of that court, upon the general principle that the misinterpretation of an act of parliament would be the subject of appeal, and not of prohibition, upon the authority likewise of a passage in Chief Justice Vaughan's argument of one of the cases reported by him, distinguishing between statutes directory to the ecclesiastical court and other statutes, and upon other grounds which it will be very fit to be considered, when it shall become necessary to the determination of a case in judgment before a temporal court in prohibition, to lay down the precise rule upon it. It is not necessary so to do in the present case, since we all agree, that allowing the plaintiff all he has assumed respecting the authority of the court of common pleas, to issue a prohibition, he has made no ground for it in the prohibition, for he has not shown that the prize court has contravened the prize acts, either directly or by mistaking the sense of them. * * *

(So much of the opinion as relates to the construction of the prize acts is omitted.)

The judgment of the court of King's Bench, reversing that of the court of Common Pleas was accordingly affirmed.

In accord.—State v. Hopkins, Dud. (S. Car.) 101; Thomas v. Mead, 36 Mo. 232; State v. Superior Ct., 8 Wash. 591;

But see, State v. Judge, 11 La. Ann. 696; People v. District Court, 11 Colo. 574, 575; State v. Municipal Ct., 26 Minn. 162.

"The King's Superior Courts of Westminster have a superintendency over all inferior courts of what nature soever, and are by law intrusted with the exposition of those laws and acts of Parliament as prescribe the extent and boundaries of their jurisdiction; so that if such courts assume a greater or other power than is allowed them by law, or if they refuse to allow acts of Parliament, *or expound them otherwise than according to the true and proper exposition of them*, the superior courts will prohibit and control them." 8 Bacon Ab. 226.

9. Granted before or after judgment in lower court.

SMITH v. LANGLEY.

1736. COURT OF KING'S BENCH. Lee, Temp. Hardw. 317.

ON a motion for a prohibition to the court of admiralty said, per LORD HARDWICKE,—The rule of granting prohibition before or after sentence is this, That before sentence you may have a prohibition upon a suggestion of a matter of fact, not appearing on the face of the proceedings below; but after sentence you cannot overturn the proceedings by a bare averment of a fact; yet, if there be

a want of a jurisdiction, appearing upon the face of the libel, or any part of their proceedings, that is sufficient ground for a prohibition after sentence, whether the cause be in an ecclesiastical court or in a court of admiralty.

"It is clearly agreed that in all cases where it appears upon the face of the libel, that the Admiralty, Spiritual Court, &c., have not a jurisdiction, a prohibition may be awarded, and is grantable as well after as before sentence; for the king's superior courts have a superintendency over all inferior jurisdictions, and are to take care that they keep within their due bounds.

But where the court has a natural jurisdiction of the thing, but is restrained by some statute; as by 23 H. 8, c. 9, for citing out of the diocese, there the party must come before sentence; for after pleading and admitting the jurisdiction of the court below, it would be hard and inconvenient to grant a prohibition.

However, it is now decided that where a spiritual court incidentally misconstrues an act of parliament contrary to the rules of the common law, a prohibition lies even after sentence; for until sentence the courts of common law have no reason to suppose that the ecclesiastical court will determine wrong, and the misconstruction is matter of prohibition rather than of appeal.

And where it appears on the face of the proceedings that the spiritual court have exceeded their jurisdiction, a prohibition will be granted, though after sentence.

But after sentence it is incumbent on the party making the application, to show clearly that the spiritual court had no jurisdiction." 8 Bacon Ab. 224, and cases cited.

See in accord.—Clark v. Rosenda, 5 Rob. (La.) 27; Ensign Manufacturing Co. v. Carroll, 30 W. Va. 532; Bodley v. Archibald, 33 W. Va. 229; State v. Elkin, 130 Mo. 90;

But see State v. Wythe, 2 Nott. & M. (S. Car.) 174; Cooper, *In re*, 143 U. S. 472; State v. Super. Ct., 2 Wash. St. 9.

Section 2.—Matters of Jurisdiction.

1. Right to issue writ confined solely to courts of superior jurisdiction.

BURCH, MAYOR v. HARDWICKE.

1873. COURT OF APPEALS OF VIRGINIA. 23 Grat. 51.

THIS was a writ of error to the judgment of the corporation court of Lynchburg, prohibiting George H. Burch, mayor of the city of Lynchburg, from proceeding to investigate charges against William W. Hardwicke, the chief of police of the city. Hardwicke applied to the judge of the corporation court of Lynchburg for a writ of prohibition, to restrain the mayor from investigating charges made against Hardwicke, as chief of police, by several citizens, on the

ground that the mayor had no jurisdiction to make the investigation, but that by the charter of the city, the power was vested in the police commissioners. The judge issued the writ; and, upon the hearing of the cause, made the prohibition absolute; and Burch, thereupon, applied to this court for a writ of error; which was awarded. The case is stated in the opinion of the court.

BOULDIN, J., delivered the opinion of the court.

(Statement of case and opinion on the question whether writ of error was improvidently awarded, omitted.)

* * * This brings us to a consideration of the errors assigned by the plaintiff in error. And in the view taken of the case by the court, it will only be necessary to consider the fourth error, which is as follows:

"4. Because the mayor of a city, in investigating the acts of a city officer, and suspending or removing him for misconduct in office does not sit as a judicial tribunal, but simply as an executive officer administering the government of the city, in respect of which there is no remedy by writ of prohibition; this being a remedy which applies exclusively to courts."

The court is of the opinion that the objection is well taken.

The writ of prohibition is an ancient common law remedy, *issuing from the superior courts of the common law to the inferior courts*, to restrain the latter from excess of jurisdiction. Its object was to keep within the limits and bounds of their several jurisdictions the various courts of the realm. See 8 Bacon's Abr. title Prohibition p. 206. The injury for which the common law provided a remedy by the writ of prohibition, says Sir William Blackstone, "is that of encroachment of jurisdiction, or calling one *non coram iudice*, to answer in a court that has no legal cognizance of the cause." And he goes on to say that the writ issues from the superior court, "directed to the judge and parties of a suit in any inferior court, commanding them to cease from the prosecution thereof, upon a suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court." 3 Bl. Comm. p. 111-112. And this account of the object and functions of the writ has been approved by the English jurists and elementary writers too numerous to mention.

The same restriction of the writ to judicial proceedings—to courts alone—has been distinctly and repeatedly sanctioned by this court. In the case of Mayo, Mayor, etc., v. James, 12 Grat. 23. Judge Moncure, speaking for the court, says of the writ of prohibition: "It is in effect a proceeding between *courts*—a *superior* and an *inferior*—and is the means whereby the *superior* exercises its due *superintendence* over the *inferior*, and keeps it within the limits and bounds of the jurisdiction prescribed to it by law." Again: In the case of The Supervisors of Culpepper v. Gorrell et al., 20 Grat. 484,

522, the court say: "A prohibition is the proper remedy to restrain an inferior court from acting in a matter of which it has no jurisdiction, or from exceeding the bounds of its jurisdiction."

It thus appears that both in England and in Virginia *the writ of prohibition is a proceeding between courts alone*. And furthermore — *That such courts must bear the relation of inferior and superior; the superior having the authority to exercise due superintendence over the inferior.*"

Now, it can not with any propriety be said, in the first place, that the mayor of a city, constituted by law the chief executive officer thereof, and clothed with discretionary powers to supervise the officers in his own department, to investigate their conduct, and to remove them from office, acts as a *court*, in the discharge of these executive functions. That would be to confound the functions of the judicial and executive departments. Nor is the mayor, when acting as chief executive officer of the city, in any sense or any degree the inferior of the corporation court, or any wise subject to its superintendence. They are distinct and co-ordinate departments of the corporate government; as much so as the executive and judicial departments of the state and federal governments; and neither has the right to supervise and control the other in the exercise of their respective duties.

In *Marbury v. Madison*, 1 Cranch's R. 137, 170, Ch. J. Marshall, speaking of courts interfering with the discretionary powers of the executive, says: "It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction. An extravagance so absurd and excessive could not have been entertained for a moment. The province of the court is solely to decide on the rights of individuals; not to inquire how the executive or executive officers perform duties in which they have a discretion. Questions in their nature political, or which by the constitution and laws are submitted to the executive, can never be made in this court." The principle thus affirmed by Ch. J. Marshall, in *Marbury v. Madison*, has been reaffirmed in numerous later cases in the U. S. Supreme Court. See *Gaines v. Thompson*, 7 Wall. U. S. R. 347, and cases there cited.

On the conceded facts of this case the court is of opinion that the plaintiff in error, whilst investigating the charges of misconduct in office and neglect of duty, preferred against William W. Hardwicke, as chief of police of the city of Lynchburg, was acting, not as a court, but as chief executive officer of the city, supervising the conduct of a person regarded by him an inferior officer in his own department; that the power of removal in such cases is a discretionary power vested in him as chief executive officer of the city; and in that character that he was not inferior to the corporation court; and was no wise subject to its superintendence or control; and, as a

necessary consequence, that the writ of prohibition was improvidently and erroneously awarded.

The judgment of the corporation court must be reversed, with costs to the plaintiff in error, and a judgment entered in his favor, discharging the rule, and giving him his costs in the corporation court * * *

Judgment reversed.

HOWARD ET AL. V. PIERCE ET AL.

1866. SUPREME COURT OF MISSOURI. 38 Mo. 296.

HOLMES, JUDGE, delivered the opinion of the court.

This was a writ of prohibition against the defendant Pierce and the Justices of the County Court of Cooper County, upon a suggestion supported by affidavit, but without an exemplification of the record of the proceedings being filed therewith. The suggestion or the petition contains but a very vague and imperfect statement of the facts; but we are enabled to gather from it that the defendant Pierce had filed a petition in the county court praying to have the plaintiffs ejected from the possession of a lot of ground, and a church building situated thereon, in the city of Boonville. The plaintiffs do not appear to have been made parties to the proceeding, whatever it may have been, and had no notice thereof; but it appears that the county court proceeded to entertain jurisdiction of the matter, and made certain orders the effect of which would be to put the petitioner in possession of the premises in question, ejecting the plaintiffs. This was certainly a very summary process of ejectment. We can only say that it is clear from one thing—that the county court had no jurisdiction to entertain such a proceeding. It was said in the argument that the title to the property was vested in the county, and that the defendant's application was only to have the liberty of taking possession of the church; but nothing of all this appears on the record. So far as we can see by the record before us, the prohibition was properly granted. The circuit court has a superintending control over the county court (R. C. 1855, p. 533, § 8) and power to issue all writs which may be necessary in the exercise of its jurisdiction according to the principles and usages of law. (*Ibid* 36.) A prohibition may issue to forbid any judicial proceeding beyond the proper jurisdiction of the inferior court—*Thomas v. Mead*, 36 Mo. 232; *Washburn v. Phillips*, 2 Metc. 296; *Ex parte Braudlacht*, 2 Hill 367. As being a summary action of ejectment this was clearly a judicial proceeding, whatever else may have been intended; and when the circuit court has jurisdiction over

the subject matter, there can be no doubt of its power to issue this writ against any court of inferior jurisdiction over which it exercises a superintending control. *Rees v. Lawler*, 4 Bibb. 395.

The defendant did not appear and answer the writ, otherwise than by a motion to quash, which was overruled and the prohibition made absolute. This motion was properly overruled.

It further appears that in the judgment which was entered, an additional order was made, upon facts made to appear to the court, directing the clerk to issue a writ of restitution to restore to the plaintiffs the possession of the premises, which (we may infer) had been taken from them by virtue of the orders which had been made by the county court in disobedience to the prohibition. We find no warrant in any authority for such a proceeding. The proper remedy for a contempt would seem to be an attachment to be enforced by fine and imprisonment, 8 Bac. Abr. by Bouvier, 244. The sheriff's execution shows that he had made restitution by putting the plaintiffs in possession of the church from which they had been thus unlawfully ejected. The defendant Pierce moved to set aside the judgment, for the reason, among others, that this order of restitution was irregular, and his motion was overruled. The justices of the county court appear to have acquiesced in the action of the court below, and refused to join with the defendant Pierce in his appeal.

On the whole, notwithstanding some irregularities, we do not see but that substantial justice has been done; nor do we think that it would be of any material advantage to the defendant here if the judgment should be reversed. The parties have other effectual remedies to settle their respective rights to the possession of this property—2 Hill, 367. We see no better way than to affirm the judgment, and it is accordingly affirmed.

Judge WAGNER concurs; Judge LOVELACE absent.

The jurisdiction of the state courts to issue prohibition is usually fixed by the constitution in the supreme court, and by the statutes or constitution in the inferior courts. For specific cases on jurisdiction of state courts see:—*State v. Rombauer*, 99 Mo. 216; *People v. Circuit Court*, 59 Ill. App. 514; *State v. Judge*, 39 La. Ann. 97; *Day v. Board*, 102 Mass. 310; *Singer Manufacturing Co. v. Spratt*, 20 Fla. 122; *Planters' Ins. Co. v. Cramer*, 47 Miss. 391; *Fleming v. Commissioners*, 31 W. Va. 608; *State v. Smith*, 104 Mo. 419; *State v. Whitaker*, 114 N. Car. 818; *Memphis v. Halsey*, 59 Tenn. 210; *Gresham v. Ewell*, 84 Va. 784; *Miller v. Wheeler*, 33 Neb. 765; *State v. Columbia*, 16 S. Car. 412; *Hyatt v. Allen*, 54 Cal. 353; *State v. Benton*, 12 Mont. 66; *State v. Hall*, 47 Neb. 579; *State v. Pollard*, 112 Wis. 232.

The writ will not lie to prevent or compel the removal of causes from state to federal courts. *Walcott v. Wells*, 21 Nev. 47; *Ex parte R. R. Co.*, 63 Ala. 349.

Contra. Sheehy v. Holmes, 55 Cal. 485.

The U. S. Supreme Court has no jurisdiction to issue prohibition to the U. S. district court save where the latter is exercising admiralty jurisdiction. *Ex parte Christie*, 44 U. S. 292; *Cooper, In re*, 138 U. S.

404. The supreme court may, however, issue the writ in aid of its appellate jurisdiction. So the circuit and district courts are only given power to issue the writ when it "may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law." So also of other extraordinary writs. The federal courts have no authority to issue the writ to state courts. Bininger, *In re*, 7 Blatchf. (U. S. Cir.) 159.

2. Questions of jurisdiction must be determined by the Superior Court.

THOMAS GRAY v. COURT OF MAGISTRATES AND FREEHOLDERS.

1825. COURT OF APPEALS OF SOUTH CAROLINA. 3 McCord, 175.

MOTION for a prohibition before MR. JUSTICE RICHARDSON.

The appellant in this case was taken up under a warrant from John Mitchell, one of the justices of the peace, on a charge for insolence, and for an attempt to strike Mr. William McDow; and a court composed of the said magistrate and two freeholders was formed for the purpose of trying him under the act of assembly regulating the trial of negroes and slaves. The appellant filed his suggestion for a prohibition in the office of the clerk of the court for Charleston district, against the magistrates and freeholders to restrain them from proceeding in the trial, alleging in his suggestion that he was not a negro, mulatto or slave under the negro act of 1740, but a free Indian and the descendant of a free Indian woman in amity with this state; that he consequently came within the exception mentioned in the act and therefore was not subject to the jurisdiction of the court of magistrates and freeholders. In support of this suggestion, affidavits in proof of these facts were also filed.

MR. JUSTICE RICHARDSON refused the prohibition, and assigned for reason "that the matter charged was within the jurisdiction of the magistrate and freeholders, and that all the incidental questions arising out of the facts set up by way of defence, remained within the jurisdiction. He said were this not the case, any party charged before an inferior court, might, by alleging a fact, raise a question belonging exclusively to a higher tribunal, and thus at pleasure estop the inferior court; *Ex gratia*; any negro might allege that he was a white man, and any man charged with a debt of twenty dollars might allege that the debt was really thirty dollars, and thereby obtain a prohibition. But such allegations ought to do no more than raise a question of fact for the consideration of the inferior court, which, if found false, the court proceeds to judgment, or if found true, the defendant prevails. To reply to this, that the oppression

of the citizen and the usurpation of jurisdiction may be practised by the inferior court, was only saying what is not to be predicted of the lowest, any more than of the highest tribunal. Both may oppress and usurp and both were equally liable to punishment therefor; but neither can be checked while acting within its jurisdiction, because it may possibly do wrong by its decision."

An appeal was now made on the grounds:

1st. That the writ of prohibition is the only remedy for persons not subject to the jurisdiction of a court of magistrates and freeholders, when arraigned before such court.

2d. Because the presiding judge mistook the law in allowing the magistrate's court to be the exclusive judges of their own jurisdiction.

3d. Because the prohibition filed by Thomas Gray and the accompanying affidavits, showed the want of jurisdiction, and the writ of prohibition ought to have been issued *ex debito justitiæ*.

JOHNSON, J.—The suggestion which is supported by affidavits, raises a strong presumption that the relator was not amenable to a tribunal constituted by a magistrate and freeholders, for the trial of slaves and other persons of color; and the question now made is, whether the circuit judge did not err in rejecting the application for a prohibition, before the court proceeded to judgment? There is no doubt that granting or denying the writ of prohibition is in a great degree discretionary; (5 Bacon's Abr. Title Prohibition, B.) and if the order made in this case had been placed on that footing, this court would have required a strong case before they would have interposed; but it is founded on the opinion that the court of justices and freeholders was the proper tribunal to determine the question of jurisdiction. That it is the province or rather the duty of the superior courts of law to confine all subordinate jurisdictions to their proper bounds, and that the question of jurisdiction belongs exclusively to them, is a proposition too clear to be controverted; and the history of this case, apart from authority, proves to demonstration that this power would be nugatory if they could not interfere until judgment; for it is said that the court on the refusal to grant the prohibition proceeded to judgment and execution, by inflicting corporal punishment on the relator. There is as little doubt, however, on the score of authority. Generally a prohibition may be awarded as well before as after sentence; but there are some cases in which the converse of the proposition is true, as in cases where the court had jurisdiction of the matter, but was restrained by some statute, then if the party by pleading admit the jurisdiction, a prohibition would not be granted; (Bacon's Abr. title Prohibition, H.) And if a court had no jurisdiction of the matter, any step is an usurpation; and although it is possible they may decide correctly, with respect to that question they may err; and in courts organized like

this, and from which there is no direct appeal, the remedy comes too late after the sentence is carried into execution. The only objection opposed to the application for the prohibition is the inconvenience that would result from a precedent which would make the superior courts of law the first resort in all cases of this kind, and thus indirectly deprive the subordinate courts of their legitimate powers. But this objection is well answered by the counsel for the motion. A security against its abuse is found in the integrity of the bar, and, surely in the discretion of the superior tribunals. And even admitting, that evils may possibly grow out of it, they are outweighed by the probability that if indulged in the uncontrolled exercise of its power, that no citizen whatever his station or rank, would be safe in life or liberty. It certainly never was designed to confide to this tribunal matters of such moment. The sentence of the court, having been carried into execution, any order which the court could make would be nugatory, and the court have only used this occasion to express its opinion on a question, and the practice in relation to which seems not to have been settled. And it may be further remarked that the act of the legislature of 1818 gives to a party the right to appeal from an order made at chambers or on circuit on an application for a prohibition, and it may be worthy of inquiry whether the subordinate court could proceed after notice of appeal. In a few cases, however, within my own experience, upon notice of an intention to appeal, prohibitions have been issued to restrain the proceedings until the determination of the appeal, and this would probably be the best course, as least subject to vexatious delays.

SUCCESSION OF WHIPPLE.

1847. SUPREME COURT OF LOUISIANA. 2 La. Ann. 236.

* * * JONANNEAU has applied to this court for a writ of prohibition to the third district court of New Orleans. The grounds presented are that, on the 12th of January, 1847, he filed in the second district court of New Orleans a petition, applying for the curatorship of the succession of Whipple, upon which the usual order of advertisement was made, and he was eventually appointed and qualified as curator by that court. That one Folger, on the 12th of January, 1847, but upon a petition filed, as he alleges at a later hour, applied for the curatorship of the same succession, in the third district court of New Orleans, and also having been appointed curator by this latter court, has obtained therein an order for the sale of certain property of the succession. He also avers that he obtained

in the second district court a rule on the adverse curator, Folger, to show cause why the proceedings in the third district court, should not be transferred to the second district court, and thereupon an order of transfer was made by the second district court. This order was made without any concurrence, or action whatever of the third district court thereon. He alleges that the appointment made by the third district court, and all the proceedings in that court, are null and void, and prays that a writ of prohibition may issue, forbidding said third district court from further entertaining any jurisdiction in relation to the administration of the estate of said Whipple, inhibiting said Folger from assuming the functions of curator of said estate, and directing the sheriff to forbear proceeding any further with the sale of the property of said estate is intended. The clerk's certificate of filing, endorsed on the petition in the second district court, exhibits the hour of the day on which it was filed. The endorsement on the petition filed in the third district court, signed by the clerk, states the day of filing, but not the hour, and a memorandum also written on the petition, but not officially signed, states the hour of filing. It further appears that Folger has taken an appeal from the decree of the second district court; but the third district court continued to exercise jurisdiction over the succession, and has ordered a sale by the sheriff.

Thus each court continues to exercise its jurisdiction, and each, under the statute, having an independent organization and jurisdiction, the one is without authority to control the other; for it must be observed that the statute has not provided which court, in case of controversy, shall decide the disputed question. This state of things may present a very proper case for legislative action. Our province, however, is to interpret the constitution and the laws as we find them, and to decide accordingly.

Whether the third district court has, or has not, lawful jurisdiction in the matter of this succession, is a question dependent under the statute of 1846, upon the fact of the time of the filing of the petition for the curatorship in that tribunal, and that question the third district court has, under the statute, as full authority to determine, *quoad* the proceedings, before it, as the second district court has as to the proceedings in its forum. The question has never been raised in the third district court. The jurisdiction of this court, under the constitution, is appellate only, except in cases specially provided. We have not a general supervising power and control over courts of inferior jurisdiction. Our supervising power, through the writs of mandamus and prohibition, is limited to those cases where its exercise is incidental to and in furtherance of our appellate jurisdiction. We can not thus create a cause. The question of jurisdiction having never been raised before the third district

court, nor decided by it, we are not authorized to hear and determine the question originally, nor would it be proper for the applicant to assume in advance that, if the question of jurisdiction was raised in that court, it would be decided adversely or erroneously.

The applicant for prohibition is not entirely without remedy before the third district court itself, and, at all events, he has not presented a case within the constitutional jurisdiction of this tribunal. It is obvious that where two courts are thus proceeding, very embarrassing and anomalous results may follow, before the subject can properly be brought before the appellate tribunal. Petitions might be filed in the five district courts of New Orleans on the same day, in the matter of the same succession; five conflicting mandates might be sent to the same sheriff, their common officer, and the same question might be determined different ways; an impropriety, says Blackstone, which no wise government can or ought to endure. The writ of prohibition would arrest such a mischief in England, for there it is the king's prerogative writ, and the king's superior courts of Westminster have, in such cases, a superintendency over all inferior courts of what nature soever, and may prohibit and control them. The necessity for some provision with regard to the collision of the district courts of New Orleans, will doubtless commend itself to the attention of the proper department of the government.

Application for prohibition dismissed, with costs.

3. Will not be issued to ministerial officer or officers.

PEOPLE EX REL. V. SUPERVISORS OF QUEENS
COUNTY ET AL.

1841. SUPREME COURT OF NEW YORK. 1 Hill 195.

H. M. WESTERN moved for a *certiorari*, *prohibition*, *mandamus*, or "some other writ, instrument, process, order or proceeding," for the relief of the relator and other taxable inhabitants of the town of North Hempstead, Queens county, from the tax which the town collector was proceeding to collect by virtue of a warrant from the board of supervisors of the county. He read an affidavit of the relator, and other papers, for the purpose of showing that the town auditors, in October last improperly allowed the sum of \$3,264.22 for the costs and expenses of several suits in relation to Pearsall's Landing, as a charge against the said town of North Hempstead; that the board of supervisors of the county, at their subsequent annual meeting, had directed that sum together with the other town charges, to be levied upon the taxable inhabitants of North Hemp-

stead; and had issued a warrant to the town collector, who was now proceeding under that authority to collect the tax. The affidavit states the relator's tax at \$46.50 of which he believes the sum of \$27 is on account of the illegal charge above specified. In addition to the objection that the allowance in question was not a proper town charge, several objections were taken to the proceedings of the town auditors and boards of supervisors. It was also insisted that the warrant to the collector was irregular and void; and that the collector had forfeited his office by neglecting to execute his official bond in due time and proper form.

(So much of the opinion as relates to *certiorari* is omitted.)

BRONSON, J.— * * * The only remaining branch of this case is the motion of the relator for a writ of prohibition to the town collector to stay the levying of the tax. A writ of prohibition does not lie to a ministerial officer to stay the execution of process in his hands. It is directed to a court in which some action or legal proceeding is pending, and to the party who prosecutes the suit, and commands the one not to hold, and the other not to follow, the plea. It stays both the court and the party from proceeding with the suit. The writ was framed for the purpose of keeping inferior courts within the limits of their own jurisdiction, without encroaching upon other tribunals. (2 Inst. 601, F. N. B. 94. Vin. Ab. Tit. Proh; and the same title in Com. Dig., Bac. Ab. 7th Lond. ed., and Tomlins' Law Dict. 3 Bl. Comm. 111. See also Tomlins' Law Dict. tit. Consultation; and F. N. B. 116.) Our statute also shows that the writ issues to a court and prosecuting party—not to a ministerial officer. (2 R. S. 587, §§ 61, 65.) In the *People v. Works* (7 Wendall, 486), although the motion for a prohibition seems to have been granted, the remarks of the chief justice are in perfect harmony with what has been said in this opinion in relation to the proper office of the writ; and that case must not be understood as having decided anything more than that the tax then under consideration was illegal. There is not the slightest foundation in the books for saying that a prohibition may issue to a ministerial officer to stay the execution of process in his hands.

If the relator has suffered, or is in danger of suffering an injury, he is mistaken in supposing that we can grant the relief which he asks.

Motion denied.

In accord.—*Grier v. Taylor*, 4 McCord (S. Car.) 206; *People v. District Court*, 6 Colo. 534; *Coronado v. San Diego*, 97 Cal. 440; *Clayton v. Heidelberg*, 17 Miss. 623; *Lacroix v. Commissioners*, 50 Conn. 321.

Contra. *People v. Works*, 7 Wend. (N. Y.) 486; *Burger v. State*, 1 McMullen (S. Car.) 410.

Section 3.—The Parties.**1. Interest required of plaintiff.**

TRAINER, PRESIDING JUSTICE, ETC., v. PORTER,,
JUDGE, ETC., ET AL.

1870. SUPREME COURT OF MISSOURI. 45 Mo. 336.

CURRIER, JUDGE, delivered the opinion of the court.

This is an application for a writ of prohibition forbidding the further entertainment or prosecution of the proceedings therein described.

The petition shows that one Talbot, late of said Montgomery county, died seized of a large amount of real estate, situated in that county, and that his personal assets were insufficient to pay his debts that one Pittman was appointed by the county court of Montgomery county to administer upon said Talbot's estate; that said Pittman, subsequent to his appointment, and in all respects in due conformity to law, advertised and sold at public vendue certain of said decedent's real estate, and that the defendant Powell became the purchaser thereof, and that he duly complied with all the terms and conditions of said sale; that said administrator thereupon reported the sale, and all his proceedings in the premises, to said Montgomery county court for confirmation; that the court, at its November term, 1869, took the same into consideration, and being fully advised in relation thereto, declined to approve the sale, and by its consideration and judgment affirmatively disapproved the same.

The petition then proceeds to show that the defendant, Gilchrist Porter, judge of the circuit court of said county, upon the application of the other defendant, setting out and showing the facts as aforesaid, on the 25th of November, 1869, issued his writ of mandamus, directed to said county court, and commanding it to approve said sale, or show cause for its failure to do so, at the then next succeeding April term of said court; that said mandamus proceedings are still pending, and that the same greatly embarrass the progress of business in said county court and obstruct the administration of justice therein.

The petition is demurred to, and the facts therein recited admitted to be true. The question is therefore presented whether the petition, upon its face, makes a case which will justify this court in further prohibiting the further prosecution of the mandamus proceedings complained of; and this raises the further inquiry whether the circuit court has jurisdiction of the cause pending before it, namely: the mandamus suit.

It is not questioned that the circuit court possesses a superintend-

ing control over the county court, and that it may, by its process of mandamus, in proper cases, require the latter to proceed with the business before it, and act thereon. It has, however, no authority to determine for the county court what judgment it shall render, or to require it to reverse its decisions, in matters of judicial cognizance after it has once acted. It is the settled doctrine on this subject that when the subordinate tribunal acts judicially, it must be left free to exercise its best judgment, and that the superior court has no authority to dictate to the former its judgments. (*State ex rel. Adamson v. Lafayetts Co.*, 41 Mo. 224; *Elkins v. Athearn*, 2 Denio, 192; *People v. Judges of Dutchess Co.* 20 Wend. 659, and see the cases cited in the opinion of the court.)

That the county court acted judicially in the disapproval of the administrator's sale, is not disputed. (See *State ex rel. West v. Clark county court*, 41 Mo. 49, and cases cited.) It is urged, however, that the circuit court acquired jurisdiction of the subject matter of the mandamus suit pending before it, and that this court ought not, therefore, to inquire into the manner in which that jurisdiction is being exercised. This proposition contains an erroneous assumption. The court, by its process, acquired jurisdiction of the party, but not of the cause of action, to wit: the action of the court in disapproving the administrator's sale. That was the gravamen of the complaint, and the circuit court as we have seen, had no jurisdiction of it whatever.

It is further insisted that the writ of prohibition ought not to issue for the reason that the proceedings of the circuit court may be reviewed in this court, through the medium of successive appeals or writs of error; and that it does not yet appear what action the circuit court may finally take in the premises. These suggestions merited consideration prior to the issue of the preliminary writ; but that writ was ordered, and the case is now here, and may as well be disposed of on its merits, so that the county court may at once proceed with its appropriate business.

It is further suggested as an objection to these proceedings that the complainant has no personal interest in the contest—that he is a mere stranger to the litigation. *If the fact were so, that would not necessarily dispose of the case.* In *State ex rel. West v. Clark County Court*, 41 Mo. 49, the judge delivering the opinion of the court says that a prohibition may issue against a court acting without jurisdiction, at the "instance of any one of the parties, or even of a stranger," and cites 36 Mo. 232; 38 Mo. 296; 5 East. 345; 1 Bay, 382; 2 Metc. 296; 23 Ala. 94; 1 Hill 201. But the presiding justice of the Montgomery County court, against whom the mandamus proceedings are pending, can hardly be regarded as a "stranger" to the controversy. He is a party to it.

Peremptory writ ordered. The other judges concur.

WALTON, COUNTY ATTORNEY v. GREENWOOD, ET AL.,
COUNTY COMMISSIONERS.

1872. SUPREME JUDICIAL COURT OF MAINE. 60 Maine, 356.

BARROWS, J.—Obviously there are insuperable technical objections to the maintenance of this process, which seems throughout to have been irregular and inapplicable to the case as stated by the petitioner.

The prayer of the petition is, "that a writ of prohibition may issue to said court of county commissioners (meaning the respondents), prohibiting them from causing the records and files in the various county offices in Somerset County to be removed to Skowhegan, and from causing notice of that fact to be published in certain newspapers, as provided in § 4 of an act of the legislature approved Feb. 15, 1872.

1. The petition is subscribed and sworn to by Sylvester J. Walton as county attorney for Somerset County, and the only persons named as respondents therein are "Albert N. Greenwood, John Russell and Sylvanus B. Walton, county commissioners of Somerset County."

Proper and competent parties are indispensable in every legal process. The petitioner here asserts no personal grievance. He undertakes to intervene in behalf of the county and to represent it in this proceeding. In view of R. S., c. 78, § 10, which confides this power in express terms to the county commissioners, we do not think it competent for the county attorney to interfere of his own motion in behalf of the county in this manner. Under the section referred to, the county commissioners are to "represent" the county—are "to have the care of its property and the management of its business." They are responsible directly to the people who elect them for the manner in which they discharge their duties. But while they are in office, they, and not the county attorney, are to represent the county in business of this description, and the county attorney acts under their direction and simply as an attorney, in the matters in which the county is interested.

It is true, that in cases where a writ of prohibition appears to be necessary to keep an inferior court within the limits of the jurisdiction prescribed by the laws and statutes of the state, it may issue at the suggestion of, or upon the information laid by, either of the parties or by a mere stranger. Bacon's Abr. Vol. IV, p. 243, tit. Prohibition (C).

It may well be that if the county attorney or any other citizen of the county, acting in his individual capacity laid before us an information, suggesting that the court of county commissioners were usurping any authority over the county records not given them by

the statutes of the state, or were exercising their powers in a manner unauthorized by law, we should feel bound to listen to his proofs, and apply the remedy required. But it does not follow that when, as in this petition, he assumes to speak "for and in behalf of the county of Somerset" in his official capacity only, we can disregard the remonstrance of these respondents, claiming that they alone legally represent the county, and have the care of its property and the management of its business, and that the county attorney has no right, in the name of the county or in his official capacity, to institute a process of this nature.

2. But if there is a want of a proper party plaintiff, it is equally apparent, that inasmuch as the writ of prohibition, if granted, operates against the party adversely interested, the town of Skowhegan has such an interest in the question here presented, that it ought to be made a party respondent and have notice of the pendency of this petition.

To proceed without such notice to the town would violate the fundamental rule that, in all suits in courts of common law, a service upon the persons or parties adversely interested is indispensable. *Ex parte Davis*, 41 Maine, 59; *Penobscot R. R. Co. v. Weeks*, 52 Maine, 456.

3. This case comes before us only upon exception filed to the rulings and adjudications of the judge presiding at *nisi prius*. The question presented is, were the rulings and decision erroneous as to matters of law?

What is called "the proof of the suggestion" or, in other words, the question whether the facts alleged in the information, upon which the claim for the prohibition is founded, are substantially true as alleged, was submitted to him, and upon well known rules his decision upon that question is binding and conclusive, and can not be reviewed on exceptions.

Now the exceptions themselves state that he decided "that the conditions of the act to change the place of holding the supreme judicial court for the county of Somerset, and to change the Shire Town of Somerset county, approved Feb. 15, 1872 (and above referred to), "had been complied with." If this were so, then the county commissioners were expressly required, by the act referred to, to do that which the petitioner asks us to prohibit.

The gravamen of the petitioner's complaint appears to be that these conditions have not been complied with, and this is alleged with much detail and divers specifications, as a reason why the prohibition should be granted.

The finding of the judge as set forth in the exceptions negatives these allegations directly, and this should have been the end of the case. It has been so often held that exceptions do not lie to correct error in the decision of questions of fact, that a citation of

authorities is needless. This precise point seems to have been in the mind of the judge when he certified the exceptions "as correct and allowed if exceptions will lie in the case." The order of the presiding judge, dismissing the temporary prohibition and petition, was in accordance with the long settled course of proceeding upon applications of this sort, and the petitioner had no ground for complaint thereof. For "though a surmise be matter of fact and triable by a jury yet it is in the discretion of the court to deny the prohibition when it appears to them that the surmise is not true." *Aston Parish v. Castle Birmidge Chapel, Hobart, 67.*

"When a prohibition is moved for the method is for the party to file a suggestion in court, stating the proceedings that have been had in the court below, and then suggesting the reason why he prays for the prohibition; upon this the court grants a rule for the other party to show cause why a writ of prohibition should not issue; and if it appear to the court that the surmise is not true or not clearly sufficient to ground the writ upon, they will deny it." *Bac. Abr. Vol. IV, tit. Prohibition (A) in notes.*

It is only when the cause alleged is seen to be true and clearly sufficient, that the prohibition is granted.

While it is thus evident that, whatever might be the general merits of the petitioner's case, this process must fail; yet, inasmuch as those merits have been elaborately discussed by counsel, and as the matter involved possesses sufficient local interest and importance to make it probable that the main questions, if not now settled, would be presented in some other form, we think it best not to base our judgment exclusively upon objections simply technical, but to give the positions taken by those opposed to the removal of the county seal from Norridgewock to Skowhegan, a deliberate and careful consideration. * * *

(Remainder of opinion concerning validity of the act of removal is omitted.)

By reason of the fact that keeping inferior courts within their legal bounds is regarded primarily as a matter of public interest, much less strictness is observed in determining who are proper parties to the writ of prohibition than is the case with other extraordinary writs. And while it would doubtless be regarded as an irregularity to issue the writ in the name of a private party instead of the state, it has been held that such irregularity is not sufficient cause for quashing the proceeding. *Baldwin v. Cooley, 1 Rich. L. (S. Car.) 256.* But the relator seems never to have been obliged to show any specific personal interest and the writ could even issue at the suggestion of one who was in no wise a party to the record in the suit or action to be prohibited. *Com. Dig. 142.* The reason as laid down by the early English Judges, is that "where an inferior court exceeds its jurisdiction, it is chargeable with contempt of the sovereign as well as a grievance to the party." *Ede v. Jackson, Fortesque 345.* See also *2 Coke Inst. 607.*

ANONYMOUS.

1700. COURT OF KING'S BENCH. 12 Mod. Rep. 423.

HOLT, CHIEF JUSTICE. In a prohibition, either of the parties contending below may be plaintiff.

2. The defendant.

GRAY, C. J.—“The only necessary defendant (to a writ of prohibition) is the tribunal whose proceedings are sought to be restrained, controlled or quashed.” *Connecticut River R. R. Co. v. County Commissioners*, 127 Mass. 50.

HAVEMEYER ET AL. V. SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO.

1890. SUPREME COURT OF CALIFORNIA. 84 Cal. 327; 24 Pac. 121.

(ONLY so much of the opinion as deals with the writ of prohibition as a proper remedy is here given.)

(This was an original application for a writ of prohibition to the respondent court commanding and directing said court and judge and the receiver of said court, to desist and refrain from proceeding and acting upon or in pursuance of a certain order appointing said receiver.)

BEATTY, C. J. * * * We come now to the questions as to the remedy. Prohibitions arrest the proceedings of an inferior judicial tribunal or officer when such proceedings are without or in excess of the jurisdiction of such tribunal or officer, and the writ issues in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. Code Civil Procedure, §§ 1102, 1103. We have shown that the superior court, in appointing the receiver, exceeded its jurisdiction, and there is no question that the petitioners are seriously injured by the enforcement of the order. If, then, they have no plain, speedy, adequate remedy in ordinary course of law, they are clearly entitled to the benefit of the writ of prohibition to arrest the proceedings under the void order. It is claimed, however, that so far as the superior court is concerned, there is nothing to arrest, that its order was made and executed before the alternative writ was issued, that the receiver alone is now acting, and that the writ does not run against him. It is true the writ does not run against ministerial officers, and it is also true that its operation is preventive rather than remedial. But property in the hands of a receiver is in the hands of the court. The receiver is the mere instrument of the court, and what he does the court does. It is the court, therefore, and not the receiver which

holds, administers and disposes of the property in his hands; and so long as the property remains undisposed of, action by the court is necessary. In such case, there is judicial action to be arrested, injury to be prevented, and a writ of prohibition is appropriate for that purpose. The writ runs to the court and operates directly upon the court, but indirectly upon the receiver. If it is served upon the receiver, it is only that he may have timely notice that the proceedings of the courts are arrested, and may stay his hand, as he is bound to do, having no power to act independently of the court, from which he derives all his authority. In this case, when the petition was filed, and our alternative writ directed to issue, the receiver, as we shall see, was still striving to obtain complete possession of the refinery and other property claimed by the petitioners; and, even if he had been in complete control, that would have been but the first of a series of steps to be taken in carrying out the purpose of his appointment. The keeping of the property, in such a case is a continuous wrong. The closing down of the works is an independent wrong. The use of a portion of the property to preserve the rest is an unlawful interference with the rights of those lawfully in possession. Besides all this, there remained to be carried out the sale and final distribution of the property. By the very terms of the order appointing the receiver, he is to hold the property subject to the further orders of the court concerning it; and the necessity of such further orders would be implied, if it had not been expressly indicated. As we understand the authorities on this point, *the operation of the writ of prohibition is excluded only in cases where the action of the inferior tribunal is completed, and nothing remains to be done in pursuance of its void order.* If its action is not completed and ended, its further proceedings may be stayed and if it is necessary for the purpose of affording complete and adequate relief, what has been done will be undone. If this were not so, the inferior court, by proceeding expeditiously and arbitrarily, could defeat the remedy.

Great reliance is placed by counsel for the respondent upon the decisions of this court, such as *Chester v. Colby*, 52 Cal. 517, and *R. R. Co. v. Superior Court*, 59 Cal. 476, to the effect that *when an inferior court or tribunal is proceeding, or threatening to proceed, in excess of its jurisdiction, the objection to its want of jurisdiction must be first submitted to such inferior court or tribunal, and by it overruled, before resort is had to a higher court for a writ of prohibition;* and, undoubtedly such is the established rule of practice in this state. But, if this is the law, it must inevitably happen in every case, as it would probably happen in many cases under any rule, that the lower court will make its ruling on the question of jurisdiction before any prohibition can be sued out; and, if it holds that it has jurisdiction, and makes orders in consonance

with that view, the writ of prohibition will be of no avail unless it affords the means, not only of arresting future action, but of undoing past action. In other words, the two positions contended for would practically abolish the remedy. No better illustration of the working of this theory can be found than that afforded by the present case. When the order to show cause why a receiver should not be appointed was served, neither these petitioners, nor the defendant corporation nor its stockholders, could have got a writ to prohibit the appointment of a receiver without first objecting in the superior court to its want of jurisdiction. Such objection, as we have seen was made. It would have been sufficient to have objected that there was no application by a creditor or stockholder for a receiver, and no grounds alleged for such appointment; but the defendant corporation, or its stockholders, went further. They showed affirmatively that there were no creditors and that all the stockholders desired the statutory trustees to settle the business of the corporation. They showed everything, in short, necessary to sustain their objection to the jurisdiction; and the opinion of the superior judge, *supra*, shows that their objections were strenuously argued and maturely considered. But what happened? After holding the matter under advisement for nearly a month the respondent filed an opinion overruling the objections to his jurisdiction, and on the same day appointed a receiver, who on the same day qualified by taking the oath and filing his bond, procured an order approving his bond and confirming his powers, and, actually, according to his own views, had possession of the vast property in controversy, before the agent of the petitioners or their attorneys had any notice that their objections to the jurisdiction had been overruled. If such proceedings conducted with such precipitate haste, can deprive the injured party of a remedy to which he is clearly entitled, then our law must be lame and impotent indeed. But happily there is no foundation for the claim, that an inferior court can by mere haste and precipitancy defeat the appropriate remedy for excess of jurisdiction, at least in a case where it may be intercepted before its action is fully completed.

We are referred by counsel for respondent to a number of the decisions of this court which are supposed to sustain their position on this point, but we do not find them at all in conflict with our views. Not one of them related to a case like this, and the general expressions to be found in the opinions must of course be construed with reference to the facts of the particular case. In *Hull v. Superior Court*, 63 Cal. 179, it was said that prohibition was not available to prevent the acts of a *de facto* ministerial officer, nor to prevent judicial acts already done. The attempt in that case was to try the right to the office of sheriff. It was decided that this could not be done by prohibition, and what was said as to judicial acts

already done had reference to the acts of the superior judge recognizing the official character of the incumbent *de facto* of the office. Such acts must of necessity have been complete, and ended past remedy. In *Moore v. Superior Court*, 64 Cal. 345, it was held that the order of the superior court was not in excess of its jurisdiction, which was a sufficient reason for dismissing the proceeding, and it was in fact dismissed on that ground. What else was said in the opinion seems to have been in answer to the claim that the court had power to undo something that the receiver had done in excess of his authority. It ought not to be necessary to point out the distinction between that case and this. Here the order of the court is in excess of its jurisdiction, and the court through its receiver, is doing and continuing to do, and threatening to complete a series of proceedings which are a wrong and injury to the petitioners. In that case the order of the court was regular and valid. The court, to which the writ alone runs, had done nothing in excess of its jurisdiction; but the receiver, as was claimed, was doing or had done something which as a receiver he had no right to do. Of course the writ of prohibition was not the proper remedy in such a case. The case of *Coker v. Superior Court*, 58 Cal. 177, does not touch the point; the decision being that the superior court had not exceeded its jurisdiction. Other decisions, cited from the reports, of other states, are equally inapplicable, but we have no time to review them. We will, however, refer to the language quoted by counsel from *High, Ex. Rem.* § 766. He quotes the following: "Another distinguishing feature of the writ is that it is a preventive rather than a corrective remedy and issues only to prevent the commission of a future act, and not to undo an act already performed." To show what this means, he should have quoted what follows in the next sentence: "When, therefore, the proceedings which it is sought to prohibit have already been disposed of by the court, and nothing remains to be done either by the court or the parties, the cause having been absolutely dismissed by the inferior tribunal, prohibition will not lie," etc. This is really the whole extent of the rule. Where the proceeding in the lower court has ended, and the court has nothing further to do in pursuance or in completion of its order, or where it has dismissed the proceeding, prohibition is no remedy; but, where anything remains to be done by the court, prohibition not only prevents what remains to be done, but gives complete relief by undoing what has been done. See forms of writs cited, 2 *Chit. Pr.* 354, 355. *Ex parte Morgan Smith*, 23 Ala. 94; *Jones v. Owen*, 5 Dowl. & L. 669; *Marsden v. Wardle*, 3 El. & Bl. 695; and cases therein cited; *Serjeant v. Dale*, L. R. 2 Q. B. 558. In *White v. Steele*, 12 C. B. (N. S.) 383, the court says (page 412), "The writs in the register and elsewhere which conclude with a mandamus to the Court Christian to recall an excommunication already errone-

ously fulminated, or a sequestration wrongly issued, are all, as to the prohibitory part, peremptory, and the mandamus to revoke the unauthorized proceeding only accessory to the peremptory prohibition, and necessary to give it effect." Here is a clear indication of the extent of the remedial office of the writ. It is primarily and principally preventive. Its office is to arrest proceedings; but when a case arises in which there are proceedings to be stayed or prevented, it will also annul such prior proceedings as may be necessary to make the remedy complete. The principle is that which prevails in equity. When there is jurisdiction, the court will afford complete relief. A party will not be compelled to resort to more than one proceeding, or more than one court, for more than one injury. See also *French v. Noel*, 22 Grat. 454. Many other cases are cited in the brief of counsel for petitioners to this point, and might be cited here, but it is unnecessary. In the nature of things it must be true that when a receiver has got possession of property under a void commission, and the future acts of the courts, *i. e.*, the sale of the property and disposition of its proceeds, are arrested by prohibition, the writ will also require a restoration of property to the petitioner; for otherwise prohibition would be worse than no remedy at all. It would prevent the owner from getting either the property or the proceeds. The receiver would continue to hold it discharged of the duty of accounting for it.

We will next consider the objection that prohibition will not lie because the petitioners, had other plain, speedy, and adequate remedies in due course of law. It is suggested that they might have moved the court below to withdraw its order for a receiver. But suppose that the court insisted that everything should be absolutely given over to the possession of the receiver before he would listen to any application for a revocation or modification of his order. Can it be said that a motion only to be considered on such conditions afforded an adequate remedy, or any remedy? And suppose the motion had been heard and denied? Would that have helped them? After all, it would have been necessary to appeal to some other court for relief. But surely counsel can scarcely be serious in contending that, because a party can move a court to set aside an invalid order, therefore he can not have a writ of prohibition; for, if this were so, there never could be a writ of prohibition. Such a motion would always be possible. The most that can be claimed is that an application should be made to the lower court before moving for the writ. But this is another point to which we shall refer hereafter. * * *

Prohibition to issue.

See also, *State v. Superior Court*, 15 Wash. 668; *Ex parte Hill*, 38 Ala. 429; *State v. Ross*, 122 Mo. 435; *State v. Hirzel*, 137 Mo. 435; *Wadsworth v. Queen of Spain*, 17 Q. B. 171.

Section 4.—Pleading, Practice and Procedure.

I. Common law practice.

"*Nota.*—When the cause is doubtful, the court usually in grant of prohibitions made the first rule, that parties should show cause why a prohibition should not go; the next rule is, that a prohibition go, unless cause be showed; and then the rule is made absolute to have a prohibition." 1 Keble 281.

EX PARTE WILLIAMS.

1842. SUPREME COURT OF ARKANSAS. 4 Ark. 537.

DICKINSON, J.—Writs of prohibition were granted in England, both in the Common Pleas and King's Bench. Burke's case, Vaughn, 157, 209; Langdale's case 12 Co. 58, 109. It lay where an inferior court was proceeding without jurisdiction. Pringe v. Child, Moore, 780; Martin v. Archbishop of Canterbury, And. 258; or where the jurisdiction belonged properly to another court. Edward's case, 13 Co. 9; Case of Prohibition, 12 Co. 76; or when the inferior court transcended its jurisdiction by holding plea for too large an amount. Coats v. Suckerman, 1 Ro. 252; or when a plaintiff had one demand, and split it into several actions, so as to give an inferior court jurisdiction. Catchmade's case, 6 Mod. 91. So, where the judges proceeded in cases where they were prohibited by an act of parliament. Porter v. Rochester, 13 Co. 4. The writ would not lie to a court having cognizance of the cause, or jurisdiction of the subject, on a suggestion of erroneous proceeding. March, 92, pl. 152. The remedy in such cases was by appeal. Smith v. Mayor of London, 6 Mod. 78; Guillian v. Gill., 1 Lev. 164. The rule was, at common law, that no prohibition lay to an inferior court in a cause arising out of their jurisdiction, until that matter had been pleaded in the inferior court, and the plea refused. Cook v. Liceuse, 1 Ld. Raym. 346; Wayman v. Smith, 1 Sid. 464; 1 Mod. 64, S. C.; 1 Mod. 81; Marriott v. Shaw, Com. 278; Mendyke v. Stint, 2 Mod. 272. It must appear, in the suggestion, that the plea was verified, and tendered in person, during the sitting of the inferior court. Sparks v. Wood, 6 Mod. 146; Clerk v. Andrews, 1 Show. 12. And there is no precedent of a prohibition, *quia timet*. The writ was obtained on a suggestion, without which no prohibition lies to an inferior court. Bishop v. Corbet, 1 Lev. 253; Blaxton v. Honor, 12 Mod. 435.

The suggestion stated the nature of the case, the proceedings in the court below, and concluded with a prayer for a prohibition. If the motion was founded on a matter of suggestion only, an affidavit

of the truth of the matter suggested, was necessary. 10 Mod. 387; *Burdett v. Newell*, 2 Ld. Raym. 1211; *Salk*. 549; but it was otherwise where the truth of the suggestion appeared on the face of the proceedings below, though after judgment. *Godfrey v. Liewellin*, *Salk*. 549; *Selby v. York*, C. T. Hard. 392. Upon the suggestion being filed, the court granted a rule to show cause why the writ should not issue, which was afterwards made absolute, or discharged, according to the circumstances of the case. If it was a nice or doubtful case, the court made the rule absolute, and directed the party applying to declare, which he did, by serving the other side with the rule, without taking out a writ, and then delivering his declaration. If the defendant then submitted, he might refuse the declaration, and the court would then, on his application, stay the proceedings without costs, because he acknowledged that the rule ought to go, and declined relying on the proceedings below; 1 *Saund*. 136, n. 1; *Bull. N. P.* 218; *Gegge v. Jone*, 2 *Str.* 1149; or the defendant might insist upon a declaration. But if the court was of opinion against a prohibition, the party applying had no right to declare. *Rex v. Bishop of Ely*, 1 *W. Black.* 81, s. c. 1 *Burr.* 198.

The inferior court was bound to desist immediately on the application for a prohibition, and the court above took notice of their practice to do so; and would take care there should be no further proceedings, by attaching the judge of the inferior court, for his contempt in going on. 1 *Sand.* 136, n. 2. By the declaration the party who applied for prohibition, suing *qui tam*, complained of the party proceeding against him in the inferior court of a plea, wherefore he prosecuted a plea in the court below, etc., after a prohibition to the contrary thereof, directed and delivered to him, for this, towit: that, whereas, etc., setting forth all the facts, the objection to jurisdiction made in the court below, and the refusal of the court to admit the plea and the allegation, concluding that the defendant is endeavoring to obtain, or has judgment and condemnation, though the writ of prohibition has been directed delivered to him on, etc., to the contrary, in contempt of the state, and to the damage of the plaintiff, etc., concluding with the common *ad dumnum*. *Crouch v. Collins*, 1 *Sand.* 136; *Lilly's Entries*, 316-328.

This declaration commenced an action, which was, in notion of law, founded upon attachment against the defendant for a contempt in proceeding after a writ of prohibition, had been served upon him. But it was mere fiction, used for the purpose of trying, with greater certainty, whether the inferior court ought to proceed further in the suit. The defendant was not in fact, served with a writ of prohibition, and, therefore, had not, in truth, incurred any contempt for a disobedience of it, but this matter was alleged for form's sake, to entitle the plaintiff to demand damages of the

defendant, and thereby to give the action the requisites of a suit. Notice was necessary to be given the defendant before his appearance. *State v. Allen*, 2 Iredell, 183. He then either demurred or pleaded to the declaration, but, in either event, he traversed the proceeding, after publication served, and the contempt, and commenced his plea or demurrer to material points, in order to have a consideration in this behalf, and prayed judgment and writ of consultation. 1 Saund. 136.

Whether the defendant pleaded or demurred, no verdict was taken on the traverse, as to the further proceeding and the contempt. It was immaterial, like the finding as to the *vi et armis*, in trespass. *Stratford v. Neale*, 1 Str. 482; s. c. 8 Mod. 1. If there was a verdict for the plaintiff, and if, upon demurrer, the court were of opinion, that there was not sufficient ground for a prohibition, judgment was given for the plaintiff, and both the defendant and the inferior court were prohibited from going any further. It was then, and not till then, that the writ of prohibition actually issued. 1 Saund. 136. The writ was directed to both the court and the party, and commanded the one not to hold, and the other not to follow the plea. 1 N. Hill 200.

If, on the other hand, the verdict was for the defendant, or the court, upon demurrer, was of opinion that there was no ground for a prohibition, then a writ of consultation was awarded; and where this writ was awarded on the merits, there could never be a prohibition upon the same suggestion. This writ was called the writ of consultation, because upon consultation had, the judges found the prohibition to be ill-founded, and, therefore, by this writ, they returned the cause to its original jurisdiction to be there determined, and commanded the inferior court to proceed and determine it, the prohibition to the contrary notwithstanding. 1 Saund. 136, n. 5; Lilly's Entries, 562; 1 Keb. 286; 8 Mod. 3; 2 Keb. 404, pl. 17. If the declaration varied from the suggestion it was bad. *Harrow's case*, 7 Mod. 114; *Gomershall v. Bishopp*, 1 Leon, 128. Both parties in prohibition being actors, there might be traverse upon traverse. Fort., 350. No traverse, however, could be taken on an allegation that the court below refused the plea. *Moore*, 425; *Stratford v. Neale*, Str. 483.

If there was no plea or demurrer in due time, judgment went by *nihil dicit*. *Turner v. Rainer*, 12 Mod. 447.

Such we have ascertained, after considerable research, to have been the common law doctrine and mode of proceeding. And as we have no statute upon the subject, the common law, with all its incidents, is, of course, as far as applicable, in force here, and it only becomes necessary so to mould the remedy as to render it available under our system of jurisprudence, preserving, as far as applicable, all its common law attributes.

We understand, then, that a party wishing to avail himself of this writ, in our courts, must, if the facts are not presented by the record of the inferior court, make the proper suggestion to the superior tribunal, setting forth all the material facts upon which he relies, with the proper allegations, and if the facts do not appear on the record verify the truth of them by affidavit. Upon the presentation of the suggestion a rule should be entered upon the opposite party, requiring him to show cause, upon a given day in court, why the writ should not issue; which rule, when so entered and served upon the inferior court, and the party, shall stay all further proceedings in the case; and the court will then, in their discretion, make it absolute, or discharge it, and if the former, direct the party to declare, without issuing the writ. If the defendant, upon the suggestion being presented, admits the facts, the rule will go, and the writ issue. But if he insists upon a declaration the case then takes the ordinary course, and must be decided upon demurrer, or plea to the merits, and the writ be granted, or the cause remanded to the original jurisdiction, to be there proceeded and determined in.

As it is a *qui tam* action under our statute, a bond for costs must be filed before or upon the filing of the declaration, which is the commencement of the action.

In the case now before us, and in which the party asks for a writ of *certiorari* to bring up the records and proceedings of the circuit court, it is evident there has been a total disregard of all the principles which govern the mode of proceeding upon prohibition, and that until there has been a final disposition of it by the circuit court, the appellate jurisdiction of this court does not attach. Upon final judgment a writ of error will lie as in ordinary cases.

The application for the writ of *certiorari* will therefore be refused.

In the following cases the common law procedure was recognized and declarations in prohibition required. *State v. Commissioners*, 1 Mills, (S. Car.) 55; *Warwick v. Mayo*, 15 Gratt. (Va.) 528; *Johnson v. Boon*, 1 Spear (S. Car.) 268.

See also *Dolby v. Remington*, 9 Q. B. 179; *Bishop of Winchester's case*, 1 Coke 38; *Croucher v. Collins*, 1 Saund. 136.

2. Modern practice.

Under the system prevailing at present in most states the fictions and technicalities of the old common law procedure have been abandoned, retaining however, in most jurisdictions, the practice of issuing the rule to show cause.

Ordinarily the first step in obtaining the writ is to file with the superior court an application, petition, relation or suggestion (the name varies) or presenting an affidavit of the facts upon which the right to the relief sought for is claimed.

AN ACT TO IMPROVE THE PROCEEDINGS IN PROHIBITION
AND MANDAMUS.

I William IV. ch. 21; March 30, 1831.

"Whereas the filing a suggestion of record on application for a writ of prohibition is productive of unnecessary expense, and the allegation of contempt in a declaration in prohibition filed before writ issued is an unnecessary form; and it is expedient to make some better provision for payment of costs in cases of prohibition; Be it enacted by the King's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that it shall not be necessary to file a suggestion on any application for a writ of prohibition, but such application may be made on affidavits only; and in case the party applying shall be directed to declare in prohibition before writ issued, such declaration shall be expressed to be on behalf of such party only, and not, as heretofore, on the behalf of the party and of his majesty, and shall contain and set forth in a concise manner so much only of the proceeding in the court below as may be necessary to show the ground of the application, without alleging the delivery of a writ or any contempt, and shall conclude by praying that a writ of prohibition may issue; to which declaration the party defendant may demur, or plead such matters by way of traverse or otherwise as may be proper to show that the writ ought not to issue, and conclude by praying that such writ may not issue; and the judgment shall be given that the writ do or do not issue, as justice may require; and the party in whose favor judgment may be given whether on verdict, demurrer, non-suit, or otherwise, shall be entitled to the costs attending the application and the subsequent proceedings, and have judgment to recover the same; and in case a verdict shall be given for the party plaintiff in such declaration, it shall be lawful for the jury to assess damages, for which judgment shall also be given, but such assessment shall not be necessary to entitle the plaintiff to costs. * * *

3. The petition.

CHRISTIAN PRIGNITZ v. RICHARD FISCHER.

1860. SUPREME COURT OF MINNESOTA. 4 Minn. 366.

FLANDRAU, J.—Application for a writ of prohibition to restrain the defendant, who is court commissioner for the county of Brown, from proceeding to hear and determine a motion to set aside a demurrer to a complaint, and for judgment as for want of

an answer in an action pending in the district court for Brown county. It does not appear from the affidavit upon which this application is founded, that the court commissioner intends to entertain the motion which is noticed for a hearing before him, and we cannot presume that he will persist in doing so if the proper objection to his jurisdiction is made by the opposing party. This court has directly decided in the cases of *Gere v. Weed*, 3 Minn. (352) and *Pulver v. Grooves*, *id.* (359) that court commissioners have no jurisdiction in such matters, and we feel bound to presume that the inferior tribunals of the state will conform their action to such ruling and decision. The mere fact that the plaintiff's counsel has noticed the motion for hearing before the court commissioner does not prove that he will insist upon entertaining it. To authorize the issuing of a writ of prohibition by this court, it should clearly be made to appear that the inferior court is about to proceed in some matter over which it possesses no jurisdiction. This may be made to appear by setting out any acts or declarations of the court or officer which indicate his intention to pursue such a course.

The trial of an issue joined upon a return to a writ of prohibition is to be conducted and judgment rendered thereon as in mandamus. Comp. Stats. 634, § 20. Since the adoption of the constitution there can be no trial by jury in this court. Const. art. 6 § 2. Therefore as a party is entitled to a jury trial on an issue being made up, upon an alternative mandamus (Comp. Stats. 633, § 13,) this court has decided that it has no jurisdiction of that writ, *Harkins v. Supervisors of Scott County*, 2 Minn. 342; same *v. Sancerbox*, *id.* 344; and, by analogy, we cannot issue the writ of prohibition under such form as will entitle the parties to join an issue upon the return and have it tried by a jury. As the writ is a highly useful one, and can only be issued by this court, we cannot suppose that the constitution designed to abolish it altogether. We therefore place such an interpretation upon the act as modified by the constitution, as will allow this court to issue the writ in the first place, as an order to show cause, to which a return may be made and the return controverted by affidavits, as in other motions; by adopting this practice, the merits can in all cases be litigated and justice done. The affidavit in this case is not sufficient to justify the issuing of the preliminary or alternative writ, and we deny the motion.

STATE EX REL. MORGAN'S LOUISIANA & TEXAS RAIL-
ROAD & STEAMSHIP COMPANY v. COURT OF
APPEALS, ETC.

1885. SUPREME COURT OF LOUISIANA. 37 La. Ann. 845.

APPLICATION for prohibition.

The opinion of the court was delivered by

BERMUDEZ, C. J.—This application for a prohibition is based on the ground that the circuit court, to which appeals have been taken in a number of cases decided in favor of the relating company, has no jurisdiction over them, the matter involved in each, exceeding, it is said, two thousand dollars.

The charge is that the circuit court "will, according to the mode of procedure which prevails therein, assimilate said motions to dismiss with the trials of said suits on their merits, and unless restrained, will hear and decide them to relator's great wrong and injury."

It does not appear that the motions to dismiss have been overruled, and that the court is about to proceed to try the merits of the cases.

The complaint is, not that the circuit court has, notwithstanding objection, maintained jurisdiction, but that the court will hear and determine to relator's great wrong and injury.

It is impossible to conceive how, after the relating company has, by the motions to dismiss, invoked the powers of the circuit court, this court can be appealed to, in order to prohibit the exercise of those powers.

Non constat the court of appeals will not sustain those motions, if it be true, as alleged, that the matter involved in each case exceeds two thousand dollars.

Were the court, however, to overrule them illegally, the relators would be entitled to seek relief here against the effect of the ruling.

It has been repeatedly held, that it is not until after a plea has been made to the jurisdiction of the lower court and overruled by it, that the interference of the supreme court can be claimed.

There is no reason to depart from that wholesome rule of practice, which, well founded in law and reason, must continue to be enforced.

The application is dismissed with costs.

MANUEL CARIAGA v. W. G. DRYDEN.

1866. SUPREME COURT OF CALIFORNIA. 30 Cal. 244.

PETITION to the supreme court for a writ of prohibition.

The petitioner was plaintiff in the case of *Cariaga v. Dryden*, reported in 29 Cal. 307. He alleged in his petition that the county judge threatened to set aside the judgment rendered by the county court of Los Angeles County, in the case of *Cariaga v. Sanchez, et al.*, in obedience to the writ of mandate issued by the district judge of Los Angeles county. The facts in relation to this judgment are reported in *Cariaga v. Dryden*, 29 Cal. 307.

The following was the affidavit to the petition:

"A. B. Chapman being first duly sworn, deposes and says, that he is of counsel for Manuel Cariaga, the petitioner in this cause, and he makes this affidavit because he is better acquainted with the facts that said Cariaga, and because the said Cariaga is absent, and affiant cannot communicate with him at present. And affiant says that he has read the foregoing petition, and he believes the same to be true."

By the court, SHAFTER, J.—

The petition alleges that the county judge of Los Angeles County threatens to set aside a judgment in favor of petitioner remaining in the county court, and that the judge has no jurisdiction to do so, inasmuch as the term of the court at which the judgment was rendered has long since transpired. The defendant has answered denying the threat imputed, and disclaims all intention to set aside or otherwise interfere with the judgment. The case is submitted upon the pleadings.

The petition is not properly verified. The affidavit is made by the petitioner's attorney; but while the affiant states that he believes the petition to be true, he fails to state that he has either knowledge or information concerning it. We cannot notice a petition for a writ of prohibition that is not supported by the proper affidavit. Treating the petition, however, as an unverified pleading, it is sufficiently met by the unverified answer of the respondent, denying the leading allegation of the petition.

The petition must be dismissed and it is so ordered.

(Concurring opinion of SAWYER, J., is omitted.)

STATE EX REL. SHAW v. ELLIS, JUDGE.

1895. SUPREME COURT OF LOUISIANA. 47 La. Ann. 1602; 18 South. 636.

NICHOLLS, C. J.—(After stating the facts) * * * The relator has filed no brief in this matter, and has obviously abandoned his application. It is without merit. He made no attempt in the lower court to obtain relief from the order of which he complains. His allegation that he has no relief in the premises, except through a writ of prohibition to be issued from this court, is a mere conclusion of law, carrying with it no force whatever, in the absence of a statement of facts which would go to support the correctness of that statement. There is nothing going to show that relator has no other relief in the premises than through a writ of prohibition from this court. We see no reason why he should not have appealed suspensively from the order, or taken an injunction against the execution of the same. *State v. Judge*, 44 La. Ann. 193, 10 South. 768. The restraining order hereinbefore granted is hereby set aside, and the writ of prohibition applied for is denied, with costs upon the relator.

The petition or application should, in addition to showing that objection was made to the jurisdiction in the court below, also show by the facts stated, the absence of any other adequate remedy and, if the writ is sought on the ground of a misconstruction of a statute, affecting the jurisdiction of a lower court, the statute should be directly pleaded or such facts stated as will bring in issue the construction of the statute in question.

See also *Barnes v. Gottschalk*, 3 Mo. App. 222; *St. Louis, etc., R. Co. v. Wear*, 135 Mo. 230; *State v. Laughlin*, 9 Mo. App. 486; *Board of Commissioners v. Spitler*, 13 Ind. 235; *Henry v. Steele*, 28 Ark. 455; *Halderman v. Davis*, 29 W. Va. 324; *Clifford v. Parker*, 13 Wash. 518; *Burch v. Hardwicke*, 23 Gratt. (Va.) 51; *Arnold v. Shields*, 5 Dana (Ky.), 18

4. The rule to show cause.

MAYO v. JAMES.

1855. SUPREME COURT OF APPEALS OF VIRGINIA. 12 Grattan, 17 *loc. cit.* 26.

MONCURE, J.—* * * The following would seem to be the proper course to be pursued on an application for a writ of prohibition to a circuit court, or a judge thereof in vacation. The ground of the application should be set out in a proper suggestion, verified by affidavit, as to such material facts as do not appear on the record; or in affidavits instead of a suggestion, according to the code, Ch. 155, p. 612. If upon such suggestion or affidavits the court or judge be clearly of the opinion that there is no good ground for a prohibition, it ought at once

to be denied. But if otherwise, a rule should be made upon the adverse party to show cause why the writ should not be issued. The execution of the rule upon the party and the judge of the inferior court will have the effect of a prohibition *quousque* or until the discharge of the rule. Upon the return of the rule executed, the court or judge will make it absolute or discharge it, as may then seem proper; and in the former case, may direct the applicant to declare in prohibition before writ issued; and ought to do so, if the defendant require it. * * *

EX PARTE WILLIAMS.

1842. SUPREME COURT OF ARKANSAS. 4 Ark. 537; *supra*. p. 524.

STATE EX REL. BEHAN v. JUDGES OF THE CIVIL DISTRICT COURT, ETC.

1883. SUPREME COURT OF LOUISIANA. 35 La. Ann. 1075.

POCHE, J.— (After stating the facts and reciting the provisional writ and order to show cause) * * *

First. The point raised by the respondent judge in his return, questions the validity of the order granted, on the ground, "that it was issued by the court, but was issued by only one of the justices thereof, without consultation with any of the other justices."

The position of the respondent judge, as a guidance for the conduct of their tribunal, in dealing with remedial writs is, that under the provisions of articles 89 and 90 of the constitution, the court alone, or at least a majority of the justices concurring, could render a valid order for any of the remedial writs.

Article 89 provides that: "The supreme court and each of the judges thereof, shall have power to issue writs of *habeas corpus*, at the instances of all persons in actual custody in cases where it may have appellate jurisdiction."

Article 90 reads: "The supreme court shall have control and general supervision over all inferior courts. They shall have power to issue writs of *certiorari*, prohibition, mandamus, *quo warranto*, and other remedial writs."

Two articles must be construed in connection with the pre-existing provisions of the code of practice touching the nature, definition and scope of the writs in question, and providing the mode of proceeding in the application, the issuing and the trial of the same.

These rules of practice recognize and treat of two distinct steps or phases in the disposition of these writs. The first step is a preliminary or provisional order under which the subordinate court complained of, is apprised of the proceeding instituted with a view to test the validity of its actions in the matters set forth by the relator. The second step is the final disposition of the relief sought by the complainant, after considering the return made by the respondent judge.

The first phase in the proceeding involves the exercise of a power provisional and preliminary in its character, and, if not otherwise regulated, it is amply provided for by article 877 of the code of practice, which reads:

"The supreme court, as well as other courts, possesses the powers which are necessary for the exercise of the jurisdiction given to it by law, in all the cases not expressly provided for by the present code."

The second or final act is the judgment of the court finally disposing of the controversy after full hearing of the parties, which judgment can be rendered only in open court, and cannot be rendered without the concurrence of three judges. Const. art. 85.

The order for a preliminary remedial writ is not a judgment or even an interlocutory decree; it adjudicates nothing, and confers no vested or irrevocable right. It is merely an incipient step towards a judicial investigation of the matters and complaints urged in the application; it can be modified or recalled by the authority whence it emanates.

To confound it with a judgment which adjudicates on, and disposes of an issue, and finally settles a controversy, and for which reasons must be adduced under a constitutional requirement (Const. art. 87) is a glaring fallacy repulsive to the legal mind.

Hence it is, that these articles of our code of practice have been uniformly construed as meaning that the action of the supreme court, or the concurrence of a majority of its justices, is not essential to the validity of a provisional order for a remedial writ, and that such a mandate has always been viewed in our jurisprudence in the light of an order entertaining the application, and directing that notice thereof be addressed to the party or parties complained of. The construction urged by the district judge would strike with absolute nullity all such orders rendered otherwise than in open court.

Out of term time, during the vacation of court, the justices have no power to meet as a court, or to make and issue orders and decrees as a court. Hence it would follow, as a logical deduction from this reasoning, that during such time the remedial writs which have been incorporated in the code of practice and engrafted in the constitution, in order to secure a more speedy administration of justice, would be paralyzed and temporarily obliterated, and that the

wrongs which they were intended to correct would be without remedy. Such a conclusion is abhorrent to the common sense as well as justice.

But should it be contended that the language of the constitution, which must prevail over the provisions of the code of practice is peremptory in requiring the action of the court, or the concurrence of a majority of the justices for the purpose of issuing a valid, preliminary remedial writ; the argument is answered by the plain text of the articles 89 and 90, which, as conceded by the district judge, must be construed together.

Article 89 unequivocally confers the power to each of the judges to issue writs of *habeas corpus* in specified cases. Now, article 90, after creating the supervisory jurisdiction of the supreme court continues the délégation of special powers begun in article 89, and is couched in the following significant language:

"They shall have power to issue writs of *certiorari*, prohibition, mandamus, *quo warranto*, etc." The only grammatical construction which the sentence admits of, shows that the pronoun *they* refers to the subject: "the supreme court and *each of the judges thereof*," in the preceding article which treats of the same subject matter. Hence it is apparent that the power conferred by the articles of the code of practice is not only maintained in the constitution, but on the contrary that the power has been *ex industria* enlarged.

Heretofore, the remedial writs could be issued in appealable cases only. Now, under the newly created supervisory jurisdiction, they are available in cases where the judgment is final in the lower court.

The construction which we give to the provisions of the code of practice, which regulate the remedial writs, is not only sustained on reason and principle, but it has its support in judicial authority. The point was made by another zealous litigant more than thirteen years ago, and it was settled in the same sense in the case of the State *ex rel.* Southern Bank v. The Judge of the Eighth District Court of New Orleans.

We quote the following language from that decision: "When in the progress of a suit, a necessity arises from the application of these writs, and the supreme court is not in session, *ex necessitate rei*, the chief justice or the senior justice present should grant the provisional order. Any other interpretation of the law would do violence to the clear intention of the law maker and to justice."

The provisional order in this case was issued by the senior associate justice, when the court was not in session, and when he was the only justice present in the state, and our conclusion is that the order emanates from a competent authority, then vested with the whole power of the court *pro hac vice*, including the power of

coercing obedience to its mandate in case of resistance or refractory conduct on the part of those to whom it was directed. * * *
(That portion of the opinion dealing with jurisdiction is omitted.)

In accord.—State v. Rombauer, 104 Mo. 619.

See also Withers v. Commissioners, 3 Brev. (S. Car.) 83; Tucker, *Ex parte*, 25 Ark. 567; Mayo v. James, 12 Grat (Va.) 17.

5. The answer or return.

STATE EX REL. v. ELKIN.

1895. SUPREME COURT OF MISSOURI. 130 Mo. 90; *supra*, p. 00.

LORD CHANCELLOR ELDON.—“But whether right or wrong, it is clear, this court can hardly hear an inferior court discuss with it for any purpose but to have the writ superseded, the question whether it issued improvidently. That is a question for the consideration of the court, out of which the writ issued, not of the court to which it is addressed. It is of the last consequence not to suffer a breath of doubt to hang upon this point; that an inferior court is not to disobey any of the writs issuing out of this court upon their notion that the writ issued improvidently. Therefore though this writ might have improvidently issued, I should without doubt have held a proceeding in breach of it a contempt.”
Iveson v. Harris, 7 Vesey Jr. 251.

6. Demurrer.

STATE EX REL. DILWORTH v. BRAUN ET AL.

1872. SUPREME COURT OF WISCONSIN. 31 Wis. 600.

LYON, J.— * * * The motion to quash the return to the alternative writ of prohibition is in the nature of a demurrer thereto; and, like a demurrer, it reaches back to the first defective pleading. If, therefore, the relation does not state a cause for issuing a writ of prohibition, it may be quashed on this motion.

We have come to the conclusion that the relation does not state facts sufficient to entitle the relator to the relief demanded by him, and hence that the same must be quashed. * * *

(Remainder of opinion on this point omitted.)

CHAPTER IV.

CERTIORARI.

Section 1.—Definition and General Principles Governing the Writ.

1. Definition and function of the writ.

“A CERTIORARI is an original writ issuing out of chancery, or the King’s Bench, directed in the king’s name, to the judges or officers of inferior courts, commanding them to return the records of a cause depending before them, to the end the party may have the more sure and speedy justice before him, or such other justices as he shall assign to determine the cause.” 2 Bacon’s Abr. Art. Cert. p. 162.

“The writ of *certiorari* is used for the purpose of removing not only legal, but likewise equitable proceedings; for when an equitable right is sued for in an inferior court of equity, and by reason of the limited jurisdiction of the court, the defendant cannot have complete justice, or the cause is without the jurisdiction of the inferior court; the defendant may file a bill in chancery praying this writ to remove the cause into the court of chancery. * * *

2 Bacon’s Abr. Art. Cert. p. 166.

“The writ of *certiorari* is an original writ, and issueth sometimes out of the chancery, and sometimes out of the king’s bench, and lieth where the king would be certified of any record which is in the treasury, or in the common pleas, or in any other court of record which is in the treasury, or before the sheriff and coroners, or of a record before commissioners, or before the escheator; then the king may send that writ to any of the said courts or offices, to certify such record before him *in banco*, or in the chancery or before other justices, where the king pleaseth to have the same certified. and he or they to whom or who the *certiorari* is directed, ought to send the same record according to the tenor of the writ, and as the writ doth command him; and if he or they fail so to do, then an *alias* shall be awarded, and afterwards a *pluries, vel causam, nobis significes*, and afterwards an attachment, if a good cause be not returned upon the *pluries*, wherefore they do not send the record.

Also the king might by such writ of *certiorari* send for the tenor of the record, or for the tenor of the tenor of the record; at his election, and those writs ought for to be obeyed, and the records

sent, as the writ commandeth them to do; and the form of some of those writs here followeth—

The king to his beloved and faithful R. greeting: Because for some certain causes we will be certified upon the record and process of outlawry against I. in the county of T. pronounced before you and your companions, our justices assigned to hear and determine divers felonies in the county aforesaid: We command you that, etc., you send the tenor of the record and process aforesaid; or thus, that without delay that you send the tenor of the record and process of outlawry aforesaid, with all things touching them, to us in our chancery under your seal distinctly, and openly and this writ. Witness, etc. (together with a number of other forms of the writ)." Fitzherbert, *Natura Breccium*, 554.

"Sect. 22. It seems agreed at this day, that regularly the court of king's bench having a general superintendency over all the other courts of criminal jurisdiction, whether they be of ancient or newly created jurisdiction, may award a *certiorari* as well as the court of chancery, to remove the proceedings before any such courts unless the statute or charter which erects them expressly gives them an absolute judicature, exempt from such superintendency; as the statutes concerning the commissioners of the Cambridgeshire Fens, etc., are said by some to have done.

"Sect. 23. And accordingly it seems to be agreed, that such a *certiorari* lies to justice in eyre; to justices of gaol-delivery; to the court of a county palatine; and to the college of physicians, having a general power by statute to fine and imprison for certain offences; to justices of the peace, etc., even in such cases in which they are empowered by statute finally to hear and determine; and also to commissioners of sewers, notwithstanding the clause in 13 Eliz. c. 9, § 5, 'that the said commissioners shall not be compelled to make any certificate or return of their commissions, or of their ordinances, laws, or doings, etc.,' for it hath been adjudged, that this is intended to exempt them from returning their orders into chancery, as by the statute of 23 Henry 8, c. 5, they were obliged to do, and shall not be construed to take away the superintendency of the court of king's bench without express words.

"It lies also to remove a presentment in a court leet, and when removed the presentment is traversable; to remove examinations taken before justices of the peace in pursuance of the 2 & 3 Ph. & M. c. 10; to a jurisdiction created by private act of parliament; to remove proceedings before commissioners of bankrupts; to remove proceedings in an action from the courts of the counties palatine; to remove an information before justices of assize against a parson for non-residence; to remove an indictment for not doing statute labour on the highway; or for not repairing a bridge; to the quarter sessions of a corporation. So also to remove proceedings before

two justices; as orders of conviction on the conventicle act, 22 Car. 2, c. 1; an order on an appeal from scavenger's rate; an order of bastardy if applied for in six months; so also it lies to remove an inquisition taken by the sheriff under a private act of parliament, and the verdict and judgment thereon. * * * " 4 Hawkins, Pleas of the Crown, c. 27.

FARMINGTON RIVER WATER POWER COMPANY v.
COUNTY COMMISSIONERS.

1873. SUPREME JUDICIAL COURT OF MASSACHUSETTS. 112 Mass.
206.

(PETITION for a writ of *certiorari* to quash the proceedings of the county commissioners of the County of Berkshire in refusing to abate a town tax assessed upon the petitioner by the assessors of the town of Otis.)

GRAY, C. J.—By the general statutes c. 145, § 8, "writs of *certiorari*, to correct errors in proceedings that are not according to the course of the common law shall be issued from and returnable to the Supreme Judicial Court according to the practice heretofore established." The determination of this case must be governed by the law and practice so established, which do not seem to have been kept in mind by either party to these proceedings.

A writ of *certiorari* (when not used as ancillary to any other process) is in the nature of a writ of error, addressed to an inferior court or tribunal *whose procedure is not according to the course of the common law*. After the writ has been issued and the record certified in obedience to it, the court is bound to determine, upon an inspection of the whole record, whether the proceedings are legal or erroneous; but the granting of the writ in the first instance is not a matter of right, and rests in the discretion of the court, and the writ will not be granted unless the petitioner satisfies the court that substantial justice requires it. *Commonwealth v. Sheldon*, 3 Mass. 188. *Ex parte Weston*, 11 Mass. 417. *Lees v. Childs*, 17 Mass. 351. *Freetown v. County Commissioners*, 9 Pick. 46; *Rutland v. County Commissioners*, 20 Pick. 71; *Gleason v. Sloper*, 24 Pick. 181. *Marblehead v. County Commissioners*, 5 Gray, 451, 453. *Pickford v. Mayor & Aldermen of Lynn*, 98 Mass. 491.

A writ of *certiorari* lies only to correct errors in law, and not to revise the decision of a question of fact upon the evidence introduced at the hearing in the inferior court, or to examine the sufficiency of the evidence to support the finding, unless objection was taken to the evidence for incompetency, so as to raise a legal ques-

tion. Hayward's case, 10 Pick. 358. Nightingale's case, 11 Pick. 168. Cousins v. Cowing, 23 Pick. 208. Stratton v. Commonwealth, 10 Met. 217. In Nightingale's case, Mr. Justice Wilde said: "We can not on *certiorari* examine the merits of a cause and set aside a verdict as against evidence." And even if incompetent evidence was admitted, the court in its discretion will refuse a *certiorari* if the fact in question was clearly proved by other evidence. Cobb v. Lucas, 15 Pick. 1. Gleason v. Sloper, 24 Pick. 181.

The refusal of the county commissioners to abate a tax can not be revised upon *certiorari*, except for an erroneous ruling in matters of law. Gibbs v. County Commissioners, 19 Pick. 298. Chicopee v. County Commissioners, 16 Gray, 38. Lowell v. County Commissioners, 6 Allen 131. The legislature has evidently considered the county commissioners a more appropriate tribunal to decide questions of fact in the matter of taxation than a court of common law or a jury.

The provisions of the general statute, c. 145, § 9, re-enacting the statute of 1858, c. 109, and empowering the court, upon *certiorari*, to "enter such judgment as the court below should have rendered, or make such order, judgment or decree in the premises as law and justice require." does not enlarge the authority of the court to examine the matters passed on below, but merely enables it, after examining the case according to the rules of law, to embody the result in a new judgment, framed so as to secure the rights of all parties, instead of being limited, as it was before the statutes were amended in this respect, to quashing or affirming the judgment below. Commonwealth v. West Boston Bridge, 13 Pick. 195, 196. Lowell v. County Commissioners, 6 Allen 131. Haverhill Bridge Proprietors v. County Commissioners, 103 Mass. 120.

If a question of law is raised at the hearing before an inferior court, whose proceedings are not according to the course of the common law and not the subject of appeal or exception, it is proper to state on the record the facts proved and the ruling in matters of law upon them. Commonwealth v. Walker, 4 Mass. 556, 558. And if this is not done, the inferior court may be required by this court to certify, together with its record, a statement of the ruling made upon the point set out in the petition for a *certiorari*. Mendon v. County Commissioners, 2 Allen, 463.

But whenever the case was within the jurisdiction of the inferior tribunal, the petitioner for a writ of *certiorari* can not be permitted to introduce evidence to contradict or vary its statement, in its record or return of its proceedings and decision. Pond v. Medway, Quincy, 193. Commonwealth v. Blue Hill Turnpike, 5 Mass. 420. Rutland v. County Commissioners, 20 Pick. 71. Mendon v. County Commissioners, 5 Allen, 13. Charlestown vs. County Commissioners, 109 Mass. 270.

It is only where extrinsic evidence has been introduced, at the

hearing upon the petition, in support of the decision below, and by way of showing that substantial justice does not require the proceedings to be quashed, that like evidence may be introduced by the party petitioning for the writ, and then upon the same point only. *New Salem*, petitioner, 6 Pick. 470. *Rutland v. County Commissioners*, 20 Pick. 71. *Gleason v. Sloper*, 24 Pick. 181. *Stone v. Boston*, 2 Met. 220, 228.

A writ of *certiorari* must be addressed to the court having the custody and control of the record of the proceedings sought to be quashed. *Commonwealth v. Winthrop*, 10 Mass. 177. It can only be granted after notice and opportunity to show cause against it; and, if granted without such notice, will be quashed as improvidently issued. *Commonwealth v. Downing*, 6 Mass. 72. When the proceedings were before county commissioners, notice of the petition should be given to them, the answer or return to the petition must be the joint act of the whole present board, and the separate answer of one commissioner can not be received. *Plymouth v. County Commissioners*, 16 Gray, 341.

The uniform practice of this court for many years, as shown in numerous reported cases, has been to hear the whole case upon the petition, in order to avoid unnecessary delay and expense to the parties, and to enable the court to deal with the substantial justice of the case, untrammelled by merely formal and technical defects in the record.

No better illustrations of the course of proceedings upon application for a writ of *certiorari* are to be found in our books than are afforded by the two cases, upon which the petitioners in this case principally rely, of *Rutland* and *Mendon v. County Commissioners of Worcester*.

In the case of *Rutland*, 20 Pick. 71, the town of *Rutland* petitioned for a writ of prohibition to the county commissioners, to prevent their issuing a warrant against the town for the expenses of making a highway laid out by the commissioners through that town, until a petition for a writ of *certiorari* to quash their proceedings could be heard, and the court said: "A petition for a writ of *certiorari* is well understood to be addressed to the discretion of the court. When the record is before the court on the return of the writ, the court will look only at the record; for this reason it will be futile to admit evidence to contradict the record on the petition for a *certiorari*; but it being within the discretion of the court to grant or refuse the writ, evidence extrinsic to the record may properly be received to show that no injustice has been done, and that a *certiorari* ought not to be issued. The petitioners, in the case before us, will in the first place exhibit the record and point out in what particulars they consider it erroneous or defective; and then the respondents may prove by extrinsic evidence that no injustice has been done, that if the proceed-

ings shall be quashed, the parties can not be placed in *statu quo*, or that for any good reason the *certiorari* ought not to be granted. If such evidence shall be offered by the respondents, the petitioners will of course have the right to rebut it by like evidence." Testimony was then introduced by both parties upon that point only; and the court, upon considering the testimony in connection with the record and the proposed petition for a *certiorari*, held that substantial justice did not require a writ of *certiorari* to be issued, and dismissed the petition.

In the case of Mendon, the petition for a writ of *certiorari* to compel the county commissioners to certify the record of their proceedings confirming the laying out of a town way by the selectmen of Mendon, alleged that the commissioners at the hearing before them made an erroneous ruling upon a question of the burden of proof, which was not stated in their record. No answer being filed to the petition, it was heard upon the admission of the respondents, in the nature of a demurrer, that the facts therein alleged were true, and the court directed a writ of *certiorari* to issue, containing a precept to the commissioners to certify their record to this court, with a statement of the ruling made by them on the point set out in the petition. 2 Allen, 463. Before a writ of *certiorari* was issued, it was agreed by the counsel that an answer to the petition might be filed, and the case be considered by the court as if the writ had been issued and the case had been heard upon the writ and answer; and the commissioners accordingly filed an answer containing a statement of their rulings in detail. To this answer the petitioners filed a replication, denying some of the facts stated in the answer, alleging that it did not contain all the material facts necessary to the determination of the case, and praying that they might be heard upon the facts. But the court held that the statement of the commissioners was conclusive, and being satisfied that their decision, as stated by them, upon the point complained of by the petitioners, was substantially correct, held that no good cause was shown for vacating their proceedings or for remitting the case to a new hearing, and adjudged the proceedings to be good. 5 Allen, 13. One passage in the opinion of Chief Justice Bigelow, in 2 Allen, 465, might at first sight be thought to imply that in a hearing upon a writ of *certiorari*, when issued the court should not be governed by strict and exact rules of law; but it is manifest from the context that he had in mind only the hearing upon the petition for the writ; and he prefaced the second opinion, in 5 Allen 15, by declaring that by the first decision "the court did not intend to change in any essential degree the mode of proceeding or the practice in cases of this nature."

In the present case, the record of the commissioners, a copy of which is annexed to the petition for a *certiorari*, does not state any

ruling of the commissioners, except their final decision that they do not find in fact or in law that the tax or any part thereof should be abated, and their order that the petition for an abatement should be dismissed. The annexing of a full report of the evidence taken before them, as a part of their report, was, to say the least, irregular, and unnecessarily encumbered their record. The petition for a *certiorari* does not specify any error in the admission or rejection of evidence, nor pray for a certificate of any ruling made by the commissioners and not appearing on their record. The answer proposed to be filed does not state any facts but those found by the commissioners at the hearing before them. The town therefore irregularly joined in the answer of the commissioners; and the name of the town should be stricken out of that answer, leaving it to stand as a return in writing by the commissioners of their findings, which can not be disputed in matter of fact, and in which the petitioners have failed to show any error in matter of law.

The evidence admitted by the commissioners, which is now argued to have been incompetent, is of two classes. The one consists of testimony as to the benefits derived by other parties in their property and business from the water power created by the reservoir dam of the petitioners. This was competent to show the value of the reservoir by reason of its capacity for valuable use, and to disprove the petitioners' allegation that it was of merely nominal value. *Pingree v. County Commissioners*, 102 Mass. 76. The other consists of answers to questions put to the petitioner's witnesses on cross-examination. This might be admitted in the discretion of the commissioners by way of testing the credibility of the witnesses. It does not appear that the commissioners allowed improper weight or effect to any of the evidence.

The necessary conclusion, following as nearly as may be the terms of the report on which the case has been reserved for our determination, is that the commissioners have the right to file the answer tendered, after amending it by striking out the name of the town; that the answer, thus amended, constitutes a good defence, which can not be impeached or controlled by the petitioners and no further proceeding is open to them, and that their

Petition for a *certiorari* be dismissed.

STATE EX REL. REIDER v. THE MONITEAU COUNTY COURT.

1891. COURT OF APPEALS OF MISSOURI. 45 Mo. App. 387.

ELLISON, J.—On application of relators a writ of *certiorari* was issued commanding the county court of Moniteau county to transmit

to this court the record of the proceedings had in that court in the matter of the application of Geo. R. Keister & Co. for a dramshop license. In obedience to this writ there has been returned to us a full record of such proceedings including the original papers.

By reference to the case of the State *ex rel.* Harrah v. Cauthorn, 40 Mo. App. 94, it will be seen that in cases of this nature we have nothing to do with the propriety of the action of the county court. If the record of the proceeding before us discloses that the court had jurisdiction in the matter of this particular application, and that it has not exceeded its powers in respect thereto, then our inquiry ends. So, whether the petitioners were in fact tax paying citizens, such as is required by law, or whether they were a majority, or whether some names on the petition were forged, were questions of fact for the county court and which we had no right to determine. The office of the writ of *certiorari* is not always stated with accuracy. On such writs the merits are not reviewed, nor can mistake of fact or law be inquired into. And, though it partakes of the nature of a writ of error, it is not so broad as that; and, furthermore, should not issue to a court from which an appeal may be taken, or to which a writ of error will lie. *Burdsall v. Phillips*, 17 Wend. 464. It is frequently too broadly stated to be solely confined to inquiry of jurisdiction in the inferior tribunal, as in *Johnson v. Moss*, 20 Wend. 145; *Ex parte Mayor of Albany*, 23 Wend. 277. In the case of State *ex rel.* Teasdale v. Smith, 101 Mo. 175, the statement is that the writ reaches matters on the face of the record which are jurisdictional *in their nature*. In *Chi., R. I. & P. R. Co. v. Young*, 96 Mo. 39, it is stated that the writ will reach errors which might not be fatal in a collateral proceeding. In 2 Burr. 1040, it is said that the writ is issued to see whether the limited jurisdictions have exceeded their "bounds."

From the cases last cited we are led to believe that *the true function of this common law writ is generally to prevent inferior tribunals, where there is no appeal or writ of error, from exceeding their jurisdiction; but that it is not confined to cases where there is an entire want of jurisdiction; it may be resorted to where, having jurisdiction, the tribunal makes an order exceeding its powers.* *Stokes v. Kharr*, 11 Wis. 389; *Talmadge v. Potter*, 12 Wis. 317.

The first objection on the part of the relators which we shall notice is, that it does not appear from the record that the petitioners for the license composed "a majority of the assessed tax paying citizens" of the town of Tipton and of the block in which the dramshop was to be located. R. S. 1889, § 4576. The words of the petitioners in the block are: "We, the undersigned assessed resident citizens and taxpayers in block C, in said city of Tipton, Missouri, respectfully request," etc. The words of the petitioners from the town at large are as follows: "We, the undersigned assessed taxpayers in the city of

Tipton, Missouri, respectfully request," etc. It is not necessary for us to say in this case that in the granting of a dramshop license, where no private rights are involved, it is requisite to jurisdiction that the record of the county court should affirmatively show those things which are required to exist before a license shall issue. Nor (conceding that it is so requisite) is it necessary to decide whether the allegations above quoted meet that requirement. The reason that it is not necessary to decide these matters is that the application for license filed in the county court in this case does recite, in the language of the statute, that the petitions contain a "majority of the assessed resident taxpaying citizens," of both the block and the town of Tipton. So conceding here (though not deciding) as was decided in *State ex rel. Harrah v. Cauthorn*, *supra*, that the record must affirmatively show the statutory essentials to granting the license in order to confer jurisdiction, it does so appear from the application quoted above and which we regard as part of the record of the county court, under the views set forth in the Cauthorn case.

* * *

(So much of the opinion as relates to the statutory procedure in granting dramshop licenses is omitted.)

SMITH v. BOARD OF SUPERVISORS.

1870. SUPREME COURT OF IOWA. 30 Ia. 531.

(APPEAL from an order dismissing petition for *certiorari* to respondents who, as was alleged, had erroneously and illegally raised the assessment of plaintiff's property.)

MILLER, J.—Upon the coming in of the return to the writ, "the plaintiff filed a motion, objecting to the sufficiency of the return and moved that defendants be required to return the evidence upon which they acted, in full." This motion was overruled; plaintiff excepted and assigned this ruling as error.

Certiorari is a common law writ, issuing from superior court directed to one of inferior jurisdiction, commanding the latter to certify and return to the former the record in the particular case. 1 Bouv. Law Dict. 215, and authorities there cited. *It differed from a writ of error in this, that the certiorari removed the cause, while a writ of error only superseded the proceedings in the court below.*

Under the revision of 1860, the writ of *certiorari* is granted in all cases where an inferior tribunal, board or officer, exercising judicial functions, is alleged to have exceeded its jurisdiction, or is otherwise acting illegally, when, in the judgment of the court applied to for the

writ, there is no other plain, speedy and adequate remedy. Rev. § 3487; *Edgar v. Greer*, 14 Ia. 211.

There are two grounds upon which this writ may be based, either of which is sufficient: 1st. That the inferior court, board or officer is alleged to have exceeded its jurisdiction. 2d. That such court, board or officer is otherwise acting illegally.

There can be no doubt that the board of supervisors had jurisdiction over the subject matter in this case. By section 739 of the Revision of 1860, "the board of supervisors of each county shall constitute a board for the equalization of the assessments, and have power to equalize the assessments of *the several persons, and townships* of the county, *substantially in the same manner as is required of the state board* of equalization, to equalize among the several counties of the state, so far as applicable, at their regular meetings in June, in each and every year," etc.

The census board constitutes the state board of equalization (Rev. of 1860, § 742), and have power to "equalize the valuation of real property among the several counties and towns in the state, in the following manner:

"1. They shall add to the aggregate valuation of real property of each county, *which they shall believe to be valued below its proper valuation*, such per centum in each case as will raise the same to its proper valuation."

"2. They shall deduct from the aggregate valuation of real property of each county, *which they believe to be valued above its proper valuation*, such per centum in each case as will reduce the same to its proper valuation."

The state board is thus, by the statute, empowered to add to, or deduct from, the assessments of real property in the several counties, *which they believe* are below or above the proper valuation. Whether the valuation in any particular county is too high or too low, rests in their belief, in their judgment and sound discretion. The county boards have "power to equalize the assessments of the several persons and townships in their respective counties, *substantially in the same manner* as is required of the state board, so far as applicable." If the board of supervisors believe an assessment of a particular "person or township" to be too low, they are authorized to raise it. And if they believe another to be above its proper valuation, they have power to reduce it. That the board may not receive evidence to enable them to form a correct judgment in the premises, we do not hold; on the contrary, we are of the opinion that they may resort to any proper mode of information that will enable them to make a just and proper equalization of the assessments within their county. But they are not required to do so in all cases.

The members of the board, coming from different parts of the county, may, and generally are, sufficiently acquainted with the

value of the property in the different portions of the county, without calling in other witnesses or procuring further evidence than their own knowledge of the facts involved. This power of equalization being conferred upon the board, to be exercised by them upon their judgment, and belief of the facts in each particular case, their discretion cannot be controlled or reviewed on *certiorari*. While they act within their jurisdiction and commit no illegalities, their proceedings, though erroneous, cannot be corrected on *certiorari*.

The ground of complaint in this case is that the board raised some of the assessments too high. We have seen that the law confers upon them the power to raise or reduce the assessments as they may believe them too low or too high. The complaint, then, is, that, in exercising their lawful authority on a subject within their jurisdiction, the board has committed errors of fact. These are not such illegalities as may be corrected on *certiorari*. *R. R. Co. v. Whipple*, 23 Ill. 108; *Commissioners, etc., v. Supervisors of Carthage*, 27 *id.* 140; *Low v. R. R. Co.* 18 *id.* 140.

The record, as certified and returned, does not show that the board received any evidence upon which they acted when they changed the assessments. The record was certified in full in the return. It was not made to appear in any manner that any of the facts connected with the action of the board, were not certified up. The motion, therefore, was properly overruled, for this reason as well as the reason that the evidence (if any) upon which the board acted, was not pertinent to any inquiry before the court. The court had no authority to review the evidence produced before the board, and upon which they acted in forming their judgment of matters of fact.

For the same reason there was no error in the refusal of the court to receive the testimony of witnesses to prove the facts alleged in the plaintiff's petition. The office of the petition or affidavit, as the statutes designate it (Rev. § 3490) is to obtain the writ. When the writ has been issued and returned, the trial is had upon the record. Rev. § 3493. To allow witnesses to be examined in *certiorari* proceedings would be to convert the proceedings into a trial *de novo* on the merits, as on appeal, which is not the office of the writ.

Whether an appeal would lie from the action of the supervisors, we need not decide. We are clear, however, that their decision can not be corrected on *certiorari*.

The judgment of the district court is
Affirmed.

HIRAM WILSON v. MARY LOWE.

1869. SUPREME COURT OF TENNESSEE. 7 Caldwell, 153.

ANDREW McLAIN, J., delivered the opinion of the court.

In this case Wilson filed his petition for *certiorari* and *supersedeas*, alleging that the defendant in error had recovered a judgment against him before a justice of the peace, and that execution had issued and had been levied on his land, there being no personal property on which to levy.

He further states in his petition, that he had previously registered his declaration of intention to take the benefit of the law in reference to a homestead, and that the sheriff had summoned three freeholders to set apart his homestead; and that they had proceeded to do so, and makes exhibit to his petition their certificate, which had been placed in his possession in pursuance of the law on the subject.

He charges that great injustice had been done him; that the land set apart was not worth more than three hundred dollars, when he was entitled to have an amount of land worth five hundred dollars, set apart; that a brother or nephew of one of the commissioners owned a portion of the judgment referred to in this case.

He prays for writs of *certiorari* and *supersedeas*, that these proceedings may be removed into the circuit court, and that the levy and the execution be stayed and superseded.

His petition was dismissed on motion of the defendant in error from which judgment of the court the plaintiff in error has appealed to this court.

Has the circuit court jurisdiction to grant relief in this case?

Section 10 of article 6, of the constitution of Tennessee is in these words: "The judges or justices of such superior courts of law as the legislature may establish, shall have power in all civil cases, to issue writs of *certiorari* to remove any cause or transcript thereof from any inferior jurisdiction into said court, on sufficient cause, supported by oath or affirmation."

It will be here observed that a plain distinction is made between superior courts of law and an inferior jurisdiction.

Section 3123 of the code, provides that the writ of *certiorari* may be granted wherever authorized by law; and, also, in all cases where an inferior tribunal, board or officer exercising judicial functions, has exceeded the jurisdiction conferred, or is acting illegally, when, in the judgment of the court, there is no other plain, speedy or adequate remedy.

Section 3124: *Certiorari* lies, on suggestion of diminution; when no appeal is given; as a substitute for an appeal; instead of *audita querela*; instead of writ of error.

In the case of *Mayor and Aldermen v. Pearl*, 11 Hum. 249, this writ was used to bring into the circuit court a distress warrant issued by the recorder of "the Mayor and Aldermen of Nashville;" which, on motion in the circuit court, was quashed.

In that case, the judge delivering the opinion of the court, remarked that, from the earliest period of our judicial history, the *certiorari* has had given to it a much more extended application than in England, and it has been used for purposes wholly unknown to the common law.

It has been adopted with us as the almost universal method by which the circuit courts, as courts of general jurisdiction, both civil and criminal, exercise control over all inferior jurisdictions, however constituted and whatever their course of proceeding, as well where they have attempted to exercise a jurisdiction not conferred, as where there has been an irregular or erroneous exercise of jurisdiction; and in criminal proceedings as well as in civil.

In the case of *Durham v. United States*, 4 Haywood, 181, this writ was used to bring into the circuit court the proceedings of a court martial.

Now, in the present case, we think there can be no doubt that the board of commissioners who set apart the homestead to plaintiff in error were in the exercise of a judicial function. They were determining the rights of the parties in interest under the law. This being so, we think this proceeding may be brought by *certiorari* into the circuit court; and if these commissioners have transcended their functions and powers, or either of them was incompetent to act as commissioner, the proceeding may be quashed on motion in the circuit court.

It is alleged in the petition, that one of these commissioners was a brother or uncle to one of the owners of the judgment.

The code provides that the officer shall summon three disinterested freeholders, not connected with the parties. The statements of the petition must, on motion to dismiss be taken as true. If these statements be true, one of these commissioners was incompetent, and the proceeding is illegal and may be quashed.

We think his honor erred in sustaining the motion to dismiss the petition. The petition, it is true, does not as definitely pray for the relief which we have indicated he would be entitled to upon establishing the truth of the allegations of his petition; but the purport of the petition is that the proceeding was illegal; and it is plain that relief from the action of these commissioners is the object of the petition.

Let the judgment of the circuit court be reversed and the cause remanded.

See also on general functions of the writ.—People v. County Judge, 40 Cal. 479; People v. Betts, 55 N. Y. 600; State v. Judge, 43 La. Ann. 825; Donahue v. Will Co., 100 Ill. 94; State v. State Board, etc., 3 S. Dak. 338; Pedronena, *In re*, 80 Cal. 144; McAllilley v. Horton, 75 Ala. 491; State v. Circuit Court, 108 Wis. 77; Sherry v. O'Brien, 22 R. I. 319; Watson v. Plainfield, 60 N. J. L. 260; Howell v. Allen, 106 Ga. 16; Lyons v. Green, 68 Ark. 205; Spencer v. Bloom, 149 Pa. St. 106.

2. Issued only as against officers and tribunals exercising judicial functions.

DRAINAGE COMMISSIONERS V. GRIFFIN ET AL.

1890. SUPREME COURT OF ILLINOIS. 134 Ill. 330; 25 N. E. 995.

BAILEY, J. This was a common law writ of *certiorari*, brought to review certain proceedings of the commissioners of the Mason and Tazewell special drainage district. Said district was organized in the year 1882, under the provisions of the act entitled "An act to provide for the organization of drainage districts, and to provide for the construction, maintenance and repair of drains and ditches by special assessment on the property benefited thereby," approved May 29, 1879, and originally embraced 42,000 acres of land situate in several townships, in the counties of Mason and Tazewell. After said district had been organized, and had constructed its main and lateral ditches, and smaller drains, and had levied, and in part collected, several assessments upon the lands in the district for the construction thereof, and had also incurred a heavy indebtedness for which it had issued its bonds, it was claimed that other lands adjoining the district at various points were actually involved in the same system of drainage, and that the owners of such lands depended upon, and were, to some extent, availing themselves of the ditches and drains thus constructed. A petition was thereupon prepared and signed by certain of the adult owners of lands in the district, praying for an enlargement of the boundaries of the district by annexing thereto the several adjacent tracts of land situated as above described. * * *

* * * Said proceedings resulted in an order by such commissioners enlarging the boundaries of said district in accordance with the prayer of the petition. Various of the owners of the lands thus annexed presented to the circuit courts of Tazewell county their petition for a *certiorari*, alleging, among other things, that the proceedings by which the boundaries of said district had been enlarged were irregular, and without jurisdiction or lawful authority

on the part of said commissioners, and praying that the record of said proceedings be brought before said court, and that said order of annexation to or extension of the boundaries of said special drainage district, and the entry thereof in the records of said district, be reversed, set aside and annulled. On said petition a writ of *certiorari* was duly issued and served, and thereupon said commissioners made return to said writ by certifying to said court the record of said proceedings. On inspection of said record, the court entered judgment quashing the same, and ordering that it forever be held for naught. Said judgment was affirmed by the appellate court (28 Ill. App. 561), and an appeal has now been taken to this court. * * *

It is strenuously urged that *certiorari* is not the proper remedy, the contention being that the petitioners should have resorted to an information in the nature of a *quo warranto*. We need not pause to determine whether *quo warranto* would lie or not, as we know of no rule, which in this case, would make that remedy necessarily exclusive, even if it should be held to be a proper or available remedy. The only question is whether the alleged defects in the proceedings for the enlargement of the drainage district are such as can be reached and remedied by writ of *certiorari*, and this question is in no way dependent upon whether a writ of *quo warranto* might not also lie to oust the drainage commissioners of their control over the territory annexed, or to dissolve the organization of the drainage district so far as it applies to that territory. The writ of *certiorari* is a well known common law writ, and in England the court of king's bench has always been in the practice of awarding it to inferior jurisdictions; commanding them to send up their records for inspection. By adopting the common law, we have adopted this as a recognized legal remedy, and in this state any court exercising general, common law jurisdiction has, unless expressly forbidden to do so by the statute, an inherent authority to issue it. *People v. Wilkinson*, 13 Ill. 660; *Miller v. Trustees*, 88 Ill. 26; 3 Am. & En. Enc. of Law, tit. "*Certiorari*." Neither in England nor in this state is it held to be a writ of right, but it issues, in proper cases, only upon application to the court, on proper cause shown. We have repeatedly held that said writ may be awarded to all inferior tribunals and jurisdictions where it appears that they have exceeded the limits of their jurisdiction, or in cases where they have proceeded illegally, and no appeal is allowed, and no other mode is provided for reviewing their proceedings. *Gerdes v. Champion*, 108 Ill. 137; *Doolittle v. R. R. Co.* 14 Ill. 381; *R. R. Co. v. Whipple*, 22 Ill. 105; *R. R. Co. v. Fell*, *id.* 333. The purpose of the writ is to have the entire record of the inferior tribunal brought before the superior court to determine whether the former had jurisdiction or had exceeded its jurisdiction, or had failed to proceed according to the essential requirements of law. The trial is solely by inspection of the record, no inquiry as

to any matter not appearing by the record being permissible, and, if the want of jurisdiction or illegality appears by the record, the proper judgment is that the record be quashed. Undoubtedly, where the controversy involves the investigation of facts not appearing upon the record, *certiorari* is not the proper remedy. Thus, if in the present case, the right to have the proceedings by which the lands in question were annexed to the drainage district set aside, and the drainage commissioners ousted of the corporate authority they now claim to exercise over said lands, depended on facts which could only be established by evidence *de hors* the record, the writ of *certiorari* would manifestly be of no avail. It may be admitted that in such case *quo warranto* would be the exclusive remedy. But here the want of jurisdiction, if it appears at all, is upon the face of the record. If, then, the proceedings of the drainage commissioners enlarging the boundaries of the district constitute a subject matter which may be reviewed by *certiorari*, that must be held to be an appropriate remedy. *The general rule seems to be that this writ lies only to inferior tribunals, and officers exercising judicial functions, and the act to be reviewed must be judicial in its nature, and not ministerial or legislative.* Lock v. Lexington, 122 Mass. 290; State v. Mayor, 34 Minn. 250, 25 N. W. 449; *In re Wilson*, 32 Minn. 145, 19 N. W. 723; Robinson v. Supervisors, 16 Cal. 208; *Ex parte Fay*, 15 Pick. 243; Stone v. Mayor, etc., 25 Wend. 157; Esmeralda Co. v. District Court, 18 Nev. 438, 5 Pac. 64; Thompson v. Multnomah County, 2 Or. 34. *But it is not essential that the proceedings should be strictly and technically "judicial" in the sense in which that word is used when applied to courts of justice. It is sufficient if they are what is sometimes called "quasi-judicial." The body of officers acting need not constitute a court of justice in the ordinary sense. If they are invested by the legislature with the power to decide on the property rights of others, they act judicially in making their decision, whatever may be their public character.* Robinson v. Supervisors, *supra*. Thus it is held that this writ lies to review the proceedings of supervisors, commissioners, city councils, etc., in opening, altering or discontinuing public streets and highways as to their legality or regularity, though not as to the question of the expediency of such improvements. 3 Am. & Eng. Enc. of Law, § 65, and authorities cited in note 4. So also in some states it has been held, subject to the foregoing qualification, to be the proper writ to correct illegalities in the levying of taxes and local assessments by assessors, commissioners, etc. (*id.*), though in this state it has been refused where the defense of illegality could be made at the hearing of the application for judgment (Pease v. City of Chicago, 21 Ill. 500). The writ has also been held to lie to review the action of school trustees in uniting and in dividing school districts (Miller v. Trustees, 88 Ill. 26; State v. Whitford, 54 Wis. 150, 11 N. W. 424); or of a town

board in removing an assessor (*Merrick v. Town of Arbela*, 41 Mich. 630, 2 N. W. 922); or of a city council in removing a city officer (*Mayor v. Shaw*, 16 Ga. 172); or of a city council in granting a ferry license (*Ex parte Fay*, 15 Pick. 243); or of a board of supervisors in ordering an election to relocate a county seat (*Harrick v. Carpenter*, 6 N. W. 574); or of a board of supervisors in creating the office of clerk of said board, and raising certain salaries which had been fixed by statute (*Robinson v. Supervisors*, 16 Cal. 208). The foregoing are a few of the many cases where this writ has been held to lie, and sufficiently illustrate the rule above stated.

The proceedings by which the boundaries of the drainage district were enlarged by the drainage commissioners were, at least in most of their important features, judicial in their character. The commissioners were required to ascertain and determine from evidence whether the requisite number of the adult owners of land in the district had signed the petition for the annexation of the adjoining lands and whether the signers were the owners of the requisite proportion of the lands embraced within the district. They were also required to ascertain and determine from evidence whether the lands sought to be annexed to the district were involved in the same system of drainage and required for outlets the drains of the district. When these facts were determined judicially, and not till then, were the commissioners authorized by the statute to enter their order annexing said lands. From their decision no appeal was given, nor were any other means provided by the statute for reviewing their proceedings. In every point of view then the case comes within that class of cases where *certiorari* is an appropriate remedy. But, as the appellants insist that a different rule has been announced by this court in various of its decisions, we will briefly consider some of the cases to which we are referred as sustaining that contention. *Renwick v. Hall*, 84 Ill. 162; *Keigwin v. Commissioners*, 115 Ill. 347, 5 N. E. 575; *Evans v. Lewis*, 121 Ill. 478, 13 N. E. 246 and *Samuels v. Commissioners*, 125 Ill. 536, 17 N. E. 829, were all cases in chancery, and it was held that there was no jurisdiction in a court of equity, for the reason that there was a complete and adequate remedy at law, and that the legal existence of the several corporations involved in those cases could be determined by an information in the nature of a *quo warranto*. *Trumbo v. People*, 75 Ill. 561; *People v. Newberry*, 87 Ill. 41; *Osborn v. People*, 103 Ill. 224 and *Blake v. People*, 109 Ill. 504, were proceedings for the collection of either school taxes or special assessments and the principle decided in those cases was that the various school districts and drainage districts in question in those several suits were at least corporations *de facto*, and that the legality of the organization of a corporation could not be attacked collaterally. *Aldermen v. Directors*, 91 Ill. 179, was trespass, and the plaintiffs were directors of a *de facto* district; and the same rule was

there declared. In *Hinze v. People*, 92 Ill. 406, it was held that *quo warranto* would lie against persons who assume to hold offices supposed to be created by a law claimed to be invalid by reason of being in contravention of the constitution; and in *People v. Board*, 101 Ill. 308, it was held that *quo warranto* also lies against a corporation which undertakes to exercise powers which it does not possess. There is nothing decided in any of these cases which shows or tends to show the validity of either of the propositions insisted upon by the appellants in this case. All that is determined by those cases may be admitted, and yet *non-constat* that the common law writ of *certiorari* does not lie in the present suit. No doubt some expressions were used in the opinions of several of those cases from which it might be inferred that an information in the nature of a *quo warranto* was the only mode of testing the legality of the formation of an existing *de facto* corporation, but that question did not arise and was not decided in those cases. However, in the case of *Lees v. Commissioners*, 125 Ill. 47, 16 N. E. 915, it was expressly held that the common law writ of *certiorari* cannot be resorted to for the purpose of determining whether a corporation has a legal existence, and that the validity of its organization can be questioned only by *quo warranto*. But there is this marked distinction between that case and this: There the corporate existence itself of a *quasi*-municipal body was sought to be challenged by *certiorari*, while here such existence is fully admitted, and the only thing sought to be done is to call in question the validity of an order of a municipal body admitted to be a corporation both *de facto* and *de jure*, extending the boundaries of the drainage district. It seems eminently proper and in consonance with the intention of the statute and the rules and analogies of the common law, that a proceeding the object of which is to forfeit or destroy that corporate life which emanates solely from the sovereign power of the state, should be instituted by the attorney general or state's attorney of the proper county. It is said, in section 778, Ang. & A. Cor., citing in that behalf, *Rex v. Pasmore*, 3 Term. R. 244, 245, and *Regents, etc., v. Williams*, 9 Gill & J. 365, that "*quo warranto* is necessary, where there is a body corporate *de facto*, who take upon themselves to act as a body corporate, but, from some defect in their constitution, can not legally exercise the powers they affect to use." It appears, however, from the same section, and from the authorities there cited, that where there is a legally existing corporation, capable of acting which has been guilty of an abuse of power, or of its franchises, then, not only will an information in the nature of a *quo warranto* lie, but *scire facias* as well. Nor do we perceive any good reason why a municipal body, which has exceeded its jurisdiction and proceeded illegally, may not, on sound legal principles, be proceeded against by *quo warranto*, by *scire facias*, or by the common law writ of *certiorari*, indifferently, as the

one or the other may afford a proper and sufficient remedy. All of these several writs are direct remedies afforded by the law, and, in respect to neither of them can it be said that it is a collateral attack upon the legal existence or organization of the corporation. As has already been suggested, this court has expressly held, in *Miller v. Trustees*, 88 Ill. 26, that the common law writ of *certiorari* was an appropriate remedy to bring before the circuit court for review the proceedings of a board of trustees of schools consolidating two school districts into one; and that seems to be going quite as far, if not further, than is demanded by the requirements of the present case. * * *

But it appears that the several landowners upon whose petition the writ of *certiorari* was issued all appeared at the hearing of the petition for the enlargement of the boundaries of the district, and urged their objection to the granting of that petition; and it is now contended that they waived all defect of notice thereby, and should not be heard to object to the jurisdiction of the commissioners. Some of these parties objected to a consideration of said petition by the commissioners upon the express ground that the statutory notice had not been given, though none of them limited their objections to that point, but all urged other objections affecting the merits of the petition. It is probably true that, by appearing generally and contesting the petition on its merits, they waived any defect of notice to themselves, and, so far, as such waiver went, they must now be held to be bound by it, and to have subjected themselves to all the legal consequences resulting therefrom. If jurisdiction of their persons, and through them of the particular lands of which they were the owners, were all that was required making the order of the commissioners granting the petition binding so far as they were concerned, it must be admitted, we think, that we have no standing here to object that the statutory notice was not given. But their relations to the subject matter of the petition were such as to give them the right to insist that the annexation of the lands proposed to be included in the district should be valid as a whole. All of said lands upon the theory of the petitioners were involved in the same system of drainage, and therefore if brought into the district by valid annexation proceedings, liable to contribute their due proportion of the expense of constructing and keeping in repair the ditches and drains of the district, thus lightening to the amount of such contributions, the burden resting upon all the other lands in the district. The subject may be illustrated thus: Supposing the proceeding was for the original organization of a drainage district embracing lands belonging to an hundred different proprietors. No sufficient notice having been given, five of said proprietors owning but one twentieth of the lands in the proposed district, appear generally and contest the organization of the district, but their objections being overruled, an

order is entered assuming to organize a district embracing the lands of an hundred proprietors. Such order would be invalid as to nineteen-twentieths of the land and could impose no burdens thereon; but, if the five owners who appeared should be held to be estopped to insist upon such invalidity, the organization would, as a legal consequence, be held valid as to them, and all the expenses and burdens of the district would fall upon their lands. The true view we think is that each land owner in the district, whether he appeared and contested the organization of the district or not, would have such interest in the question of the legality of the organization as to the lands of the other owners, as would give him the right, in any proper proceeding brought to test the question, to allege want of jurisdiction of the persons of the other land owners in the district, and of the lands owned by them, and to insist that, for that reason, the entire organization of the district was illegal and void. The same reasoning applies with equal force to a proceeding like the present for the annexation of lands to a district already formed. In this case large portions of the lands sought to be annexed belonged to owners who did not appear or contest the petition, some of whom appear to have been minors. As to them the annexation proceedings were clearly illegal, and void, and, being void as to them, we are of the opinion that they were void *in toto*. We therefore think that the circuit court properly entered a judgment quashing said proceedings, and that said judgment was properly affirmed by the appellate court. The judgment of the appellate court will be affirmed.

IN RE SALINE COUNTY SUBSCRIPTION, THOMPSON ET AL.
PETITIONERS.

1869. SUPREME COURT OF MISSOURI. 45 Mo. 52.

BLISS, JUDGE, delivered the opinion of the court.

The county court of Saline County subscribed for \$400,000 of the stock of the Louisiana and Missouri River Railroad Company, and have issued bonds in the payment of said stock. Philip H. Thompson and other taxpayers of said county sued out of this court a writ of *certiorari* directed to the judges of said court, charging a want of authority to make the subscription and issue the bonds.

Before considering any other question the preliminary one must be decided, whether *certiorari* will lie in a case of this kind. "A *certiorari* is an original writ issued out of chancery or the king's bench, directed in the king's name, to the judges or officers of inferior courts, commanding them to return the records of a cause depending before them, to the end that the party may have more sure

and speedy justice." (Bac. Abr. *Certiorari*, A.) The matter not being regulated by statute in Missouri, either as to the cases in which this writ may issue or the practice under it, we are left entirely to the general law. The writ issues only to inferior courts and to review only judicial action. Was, then, the action of the county court of Saline county, in subscribing to the stock of the railroad company and issuing bonds, a judicial action? Judicial action is an adjudication upon the rights of parties who in general appear or are brought before the tribunal by notice or process, and upon whose claim some decision or judgment is rendered. It implies impartiality, disinterestedness, a weighing of adverse claims, and is inconsistent with discretion on the one hand—for the tribunal must decide according to the law and rights of the parties—or with dictation on the other, for in the first instance it must exercise its own judgment according to law, and not act under a mandate from another power. The tribunal is not always surrounded with the machinery of a court, nor will such machinery necessarily make its action judicial. A county court is certainly a judicial body for some purposes, but no more so for the name, nor for the fact that it has a seal and clerk and keeps a record. The character of its action in a given case must decide whether that action is judicial, ministerial or legislative, or whether it be simply that of a public agent of the county or state, as in its varied jurisdiction it may by turns be each.

The authorities all agree that the action to be reviewed by the writ must be judicial, but they are not wholly consistent as to what action is judicial. I find, however, a great preponderance, both in the reasoning of the judges, and, as I think, in the weight of the authority, against the proposition that proceedings like those of the county court under consideration can be treated as judicial. There are but two cases in our reports where the writ of *certiorari* as an original writ was issued from this court. The first is *Rector v. Price*, 1 Mo. 198, where the principal question was the right to issue it under our then constitution; and the other is the *Hannibal & St. Joseph Railroad Company v. Morton*, 27 Mo. 317, to review the action of reviewers appointed by the circuit court in assessing damages to the owners of land over which this railroad passed. The question that arises in the present case was not raised in either of those, as there was no doubt in regard to the judicial character of the action under review; but our decisions upon the various subjects of county court jurisdiction in relation to their character as judicial, or otherwise, have been generally consistent.

The proceedings in general of county courts in probate matters have been treated as judicial, especially when they are adverse, and parties are brought in, or are supposed to be in court; and while some things in the laying out and opening of public roads may be considered as legislative or administrative, still all action affecting

the property rights of private persons is clearly judicial and subject to review in the appellate courts. (*Overbeck v. Galloway*, 10 Mo. 364; *Cooper County v. Geyer*, 19 Mo. 247; *Bernard v. Callaway County Court*, 28 Mo. 37; *County of St. Louis v. Lind*, 42 Mo. 348; *Foster v. Dunklin*, 44 Mo. 216.) This court, in the county of St. Louis v. Sparks, 11 Mo. 201, seems to treat the action of the county court against a defaulting collector as judicial, it having been based upon the provisions of article II of the act concerning county treasurers in the revision of 1835 (p. 151)—a very different statute from the one now in force on the subject, and one that made it the duty of the county court to render judgment against the defaulter.

In approving the bond of a sheriff, county courts act in a ministerial and not in a judicial capacity. (*State ex rel. Adamson v. Lafayette County Court*, 41 Mo. 221; *State ex rel. Jackson, v. Howard County Court*, *id.* 247.)

County courts have exclusive jurisdiction in the repairing of public buildings. "These matters belong to the administrative and ministerial functions of the county court, and not to the judicial branch of their jurisdiction." (*Vitt v. Owens*, 42 Mo. 512.)

The action of the county court in making a subscription to the stock of a railroad company is discretionary and administrative. There is no imperative obligation to make it. (*St. Joe and Denver City R. R. Co. v. Buchanan County*, 39 Mo. 485.)

We have held at this term, in *Marion County v. Phillips*, that a settlement with the county collector was not a judicial act, but that of the public agents of the county with one of its officers; and the general question is also considered. The case of *St. Joe and Denver City Railroad Company v. Buchanan county*, expressly decides the case at bar; and all the cases are inconsistent with the idea that the exercise of a discretionary power, given by law to the county court of Saline County, if it be given to make a subscription to the stock of a railroad, can be in any sense a judicial proceeding. A court has no discretion, but must render judgment according to the facts and the law, while this subscription might have been made or refused. The judges were bound, it is true, to act with good judgment, judiciously; but exercising a sound judgment is by no means synonymous with rendering judgment, and acting judiciously is not always acting judicially.

Counsel press upon our consideration the authority of *Robinson v. Board of Supervisors of Sacramento*, 16 Cal. 208, where the action of the board, in raising the salaries of certain clerks, was held by a majority of the court to be judicial, and subject to be reviewed on *certiorari*. Justices Baldwin and Cope constituting the majority and Chief Justice Field dissenting. Justice Baldwin gives a long opinion, while C. J. Field simply says that he regards the ordinance as a legislative act involving in its passage no judicial functions. I

have examined the authorities cited in support of the opinion of the majority, and upon which it was expressly based, contrary, as they said, to the original opinion of the judges, and am more than ever impressed with the jumble and uncertainty in which this subject has been involved in our most respectable courts. Among the authorities relied on was *Supervisors of Onondaga v. Briggs*, 2 Denio 26, in which the plaintiff had prosecuted the defendant to recover back fees illegally charged and paid him as county attorney. His bills had been annually taxed by a supreme court commissioner, upon notice to the chairman of the board of supervisors, and regularly audited and paid by the board. The supreme court held that no part of the sums so paid him could be recovered back, and gave the following conclusions of law as applicable to the case: "1. That the taxation was a judicial determination of the matter by officers duly authorized to adjudicate upon it, and, consequently, that the taxation can not be set aside or disregarded in this collateral action. 2. But if the taxation is not conclusive, then the matter has been adjudicated by the board of supervisors, who had ample authority to decide it; and their determination is conclusive upon both parties, and especially upon themselves; and 3. The plaintiffs have voluntarily paid the money with a full knowledge of all the facts, and can not, therefore, recover it back."

The Supreme Court of California must have relied upon the second proposition and construed it as holding that the board of supervisors, in auditing claims against the county, acts judicially, and that their action has the force of a judgment. If that was intended, it certainly is not the law of Missouri. Our county courts are the auditing boards of the several counties, and the statute goes so far as to provide for an appeal to the circuit court if the account is rejected. (Gen. Stats. 1865, ch. 38, § 36.) Yet our courts do not hesitate to entertain suits against counties upon rejected claims, which would be absurd if their action had the force of a judgment. So, also, this court issues a mandamus against county courts in a proper case, commanding them to pay rejected accounts, which is utterly inconsistent with their judicial character. (*State v. Buchanan county court*, 41 Mo. 254.)

The following extract from an opinion of Judge Cowen is one of the cases cited in support of *Robinson v. Board*, etc., is very pertinent to the general question: "The power to interfere by *certiorari* is laid down very broadly by some dicta importing that all infringement of rights by persons legally clothed with authority to act, but who exercise that authority illegally, may be corrected by *certiorari*. * * * None of these cases, however, in which this language is used, and none which were referred to by the learned judges using it, have gone beyond a review of judicial decisions. Taking these dicta in the abstract, we might remove every by-law or other cor-

porate act of every corporation in the state. *Parks v. Mayor, etc.*, of Boston, held that when the mayor and alderman had the right to take property for laying out or widening a street, whenever in their opinion it was necessary, the taking was an exercise of judicial power. (8 Pick. 225.) But no other case, I think, has gone so far; and a liberal application of that decision would seem to take in every act which a corporation can do under any statute power whatever. It was said that the corporation was required to adjudicate on the necessity of taking property; but the same thing may be said of every act which a corporation may do under the most common power, even affixing their corporate seal." And this most learned of judges goes on to account for their erroneous opinion, from the fact that our courts have been misled by English decisions in regard to the commissioners of sewers, who constitute a court of record, and whose acts are judicial. (In the matter of *Mt. Morris Square*, 2 Hill. 22.) Since the hearing in *Robinson v. Board, etc.*, of Sacramento, the supreme court of New York, in the *People v. Supervisors of Livingston County* (43 Barb. 232), follows up the matter of *Mt. Morris square*, in restricting the operation of the writ, and condemning the looseness of the earlier decisions. (See also *The People v. Board of Health, etc.*, 33 Barb. 346.)

If we were to entertain jurisdiction to review by *certiorari* the action of the county court of Saline upon a discretionary matter, and one involving no judicial functions, I know not what proceeding of county and city authorities might not be brought before us. Counsel are aware of the labor involved to keep down our growing docket, and can readily imagine its condition if we were to assume the power of revising the legislative and ministerial acts of all public agents in the state. Still, had we the jurisdiction, the matter of convenience to the people and bondholders of Saline, suggested by counsel, would be a proper matter of consideration, as this is a discretionary writ, and not a writ of right; but as it is, ultimate confusion, rather than convenience, would follow such a breaking down of the landmarks of the law.

The motion for the writ was granted without hearing, but the proceedings sought to be reviewed not being judicial, the writ is quashed. The other judges concur.

PINE BLUFF WATER & LIGHT CO. v. CITY OF PINE BLUFF.

1896. SUPREME COURT OF ARKANSAS. 62 Ark. 196; 35 S. W. 227.

CERTIORARI by the Pine Bluff Water & Light Company to review an ordinance of the City of Pine Bluff requiring plaintiff to deposit with the city a certain sum before making excavations in the streets,

and that the filling and paving of excavations should be done under the supervision of an engineer to be paid by the person making the excavations. From a judgment denying the writ, plaintiff appeals. Affirmed.

BATTLE, J. Does the writ of *certiorari* lie to review the ordinance of the city of Pine Bluff which is in question in this proceeding?

At common law the writ lies only to review the judicial action of inferior courts, or of public officers or bodies. When the action of the public officers or bodies is purely legislative, administrative and executive, although it involves the exercise of discretion, it is not reviewable on *certiorari*. *People v. Walter*, 68 N. Y. 403; *People v. Mayor, etc., of New York*, 2 Hill, 9; *In re Mt. Morris Square*, *id.* 14; *State v. Kemen*, 61 Wis. 494; 21 N. W. 530; *People v. Board of Supervisors of Livingston Co.* 43 Barb. 232; *People v. Board of Commissioners of New York*, 97 N. Y. 37; *People v. Board of Supervisors of Queens Co. (N. Y. App.)* 30 N. E. 488; *Whittaker v. Village of Venice (Ill. Sup.)* 37 N. E. 240; *Commissioners v. Giffin (Ill. Sup.)*, 25 N. E. 995; *Esmeralda Co. v. Dist. Ct.*, 18 Nev. 438, 5 Pac. 64; *People v. Martin*, 142 N. Y. 228, 37 N. E. 117; *State v. Board of Aldermen of City of Newport (R. I.)*, 28 Atl. 347; 2 Dill. Mun. Cor. (4th ed.) § 927; 2 Spell. Extraordinary Relief, § 1954. But it is not essential that the officers or bodies to whom it lies shall constitute a court, or that their proceedings to be reviewable by the writ, should be strictly and technically "judicial," in the sense that word is used when applied to courts. It is sufficient if they are what is termed "*quasi-judicial*." It has been held that it lies to review the proceedings of officers and bodies, because they are *quasi-judicial* in the following cases: Of supervisors, commissioners and city councils in opening, widening, altering or discontinuing public streets and highways (*Parks v. Mayor, etc., of Boston*, 8 Pick. 226; *Tucker v. Rankin*, 15 Barb. 471); assessments for sewers or other improvements (*Attorney general v. Mayor, etc., of Northampton*, 143 Mass. 589, 10 N. E. 450); of school trustees (*Miller v. Trustees*, 88 Ill. 26; *State v. Whitford*, 54 Wis. 150, 11 N. W. 424); of a town board in removing an assessor (*Merrick v. Board*, 41 Mich. 630, 2 N. W. 922); of a city council removing a city officer (*Mayor, etc., of Macon v. Shaw*, 16 Ga. 172; *People v. Nichols*, 79 N. Y. 582; *People v. Hayden (City Ct. of Brooklyn)*, 27 N. Y. Supp. 881); of a city council in granting a ferry license (*Ex parte Fay*, 15 Pick. 243); of a board of supervisors in ordering an election to relocate a county seat (*Herrick v. Carpenter (Iowa)*, 6 N. W. 574); of a board of supervisors in creating the office of a clerk of said board, and raising certain salaries which had been fixed by statute (*Robinson v. Supervisors*, 16 Cal. 208); of proceedings of directors of a township directing their secretary not to certify a tax that had been voted (*Smith v. Powell*, 55 Ia. 215, 7 N. W. 602); of pro-

ceedings of commissioners in refusing or granting a liquor license (People v. Commissioners of Excise of Claverack (Co. Ct.) 25 N. Y. Supp. 322; Dexter v. Town Council (R. I.) 21 Atl. 347; and of proceedings of a board of equalization (Orr v. Board (Idaho), 28 Pac. 416). There are other proceedings of officers and public bodies which it lies to review, because they are *quasi-judicial*, but those mentioned are sufficient to illustrate the rule.

But it is insisted that the ordinance before us is reviewable on *certiorari* under section 1125 of the digest. That section provides that circuit courts "shall have power to issue writs of *certiorari* to any officer or board of officers, or any inferior tribunal of their respective counties, to correct any erroneous or void proceeding, and to hear and determine the same." Literally construed this section gives to circuit courts the power to correct on *certiorari*, every erroneous act of any and all officers, board of officers and inferior tribunals, and to even correct all their void acts. How this can be done is difficult to understand and comprehend. It is evident it was not intended to be understood in that sense. How, then, can its meaning be determined except by aid of the common law? In R. R. Co. v. Barnes, 35 Ark. 99, this court held that it did not so enlarge the office of the writ, "as to make it answer the ends of an appeal or writ of error, for the correction of mere errors in judicial proceedings." In that case the court confined the writ to its office as defined by the common law. By what process of reasoning it can be limited in that respect, and not in others, I am unable to understand.

The "Code of Practice in Civil Cases" and its amendments, of which this statute is a part, was not intended as an amendment of the system of pleading and practice prevailing at the time of its adoption, but as a substitute for "any case provided for by" it "or inconsistent with its provisions." Section 857. This being the object of it and its amendments, it is evident that so much of section 1125 of the digest as we have quoted was not intended to amend the common law by enlarging the office of the writ; but, presumably knowing its office at common law, the legislature adopted it, and made it a part of the code, as it was of the common law pleading and practice, and thereby intended to authorize the circuit courts by means of it, to review judicial and *quasi* judicial proceedings of officers, boards of officers, and inferior tribunals, and no other.

The ordinance under consideration is purely legislative, and is not reviewable on *certiorari*.

The judgment of the circuit, denying the writ, is affirmed.

QUINCHARD v. BOARD OF TRUSTEES OF
ALAMEDA ET AL.

1896. SUPREME COURT OF CALIFORNIA. 113 Cal. 664; 45 Pac. 856.

CERTIORARI by Quinchard against the board of trustees of Alameda and others. Judgment for plaintiffs and respondents appealed. Reversed.

HARRISON, J.—The plaintiff obtained a writ of review from the superior court for the purpose of annulling an order passed by the board of trustees of Alameda for the improvement of a certain street in that city, and all subsequent proceedings in reference thereto. Upon the return to the writ, and after a hearing thereon, the court rendered its judgment annulling its order for the improvement, “and that all acts or proceedings taken or had, done or performed, by the said board of trustees and by the said superintendent of streets, respondents, subsequent to the said 23d day of March, 1891, appearing in and by the returns herein, be, and the same are hereby annulled, and held for naught.” From this judgment the respondents to the writ have appealed.

The plaintiff does not contend that the resolution of intention to order the improvement is insufficient, or that it was not properly passed by the board of trustees, or that the notices and other proceedings required by the street improvement act in order to give to the board of trustees jurisdiction to order the improvement were not properly given; but it is claimed that the proceedings subsequent thereto were of such a character as to vitiate the order, as well as the contract for doing the work, and the assessment issued therefor. Counsel have discussed very fully the sufficiency of these subsequent proceedings, but from the conclusion we have reached upon the proposition of the appellants that the writ was improperly issued, it is unnecessary to pass upon the sufficiency of these proceedings. At common law the writ of *certiorari* was employed for the purpose of reviewing the proceedings of inferior tribunals in their exercise of judicial powers, and was issued in cases where the final determinations of these tribunals were not subject to review in any other mode. The writ was considered an extraordinary legal remedy, and was issued in the discretion of the court, and only when there was no other mode of review. This discretion, however, was not arbitrary, but was only a legal discretion controlled by principles of law, and, if improperly exercised, was subject to be corrected on appeal. *Board of Supervisors v. Magoon*, 109 Ill. 142. As a street assessment in this state can be collected only by means of foreclosure in a court of record, and as the facts relied upon by the plaintiff herein be available in defense of such an action, and, if deemed, sufficient to establish a want of jurisdic-

tion either to order the improvement or to award the contract, would defeat the action, the discretion of the court would have been properly exercised in denying the writ. (Spooner v. City of Seattle, 6 Wash. 370, 33 Pac. 963; People v. Myers, 135 N. Y. 465, 32 N. E. 241.) The writ should never be employed as a substitute for an action to remove a cloud from a title. The scope of the writ has been limited in this state by the provisions of 1068, Code Civ. Proc., and it is to be issued only "when an inferior tribunal, board or officer exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, and there is no appeal, nor in the judgment of the court any plain, speedy and adequate remedy;" and by section 1074: "The review upon this writ cannot be extended further than to determine whether the inferior tribunal, board or officer has regularly pursued the authority of such tribunal, board or officer." In Central Pac. R. R. Co. v. Board of Equalization of Placer Co., 43 Cal. 365, it was held that the clause in section 1074, "whether the inferior tribunal has regularly pursued the authority of such tribunal," is to be construed as the equivalent of the clause, "has exceeded the jurisdiction of such tribunal," in section 1068. *The character of the act or determination sought to be reviewed, rather than of the tribunal or officer by which the act or determination is made, is the test for determining whether the writ should be issued*, for it is only a determination which is made "when exercising judicial function," that can be reviewed. "The officer or tribunal to whom the writ of *certiorari* is issued must be an inferior officer or tribunal exercising judicial functions, and the proceeding to be brought up for review must be a judicial proceeding." People v. Bush, 40 Cal. 344.

The functions exercised by a municipal corporation may be legislative, administrative or judicial, but only the acts done by it "when exercising judicial functions" can be reviewed under this procedure. "This writ does not lie under our laws to review the action of any tribunal, board or officer in the exercise of functions which are legislative in their character." People v. Oakland Board of Education, 54 Cal. 375. Whether an existing street shall be improved is a question to be addressed to the governing body of a municipality in its legislative capacity, and its determination upon that question, as well as upon the character of the improvement to be made, is a legislative act. Dill. Mun. Cor. § 94, 927; Creighton v. Mason, 27 Cal. 613; De Witt v. Duncan, 46 Cal. 343; Bolton v. Gilleran, 105 Cal. 244, 38 Pac. 881. The act does not cease to be legislative because the members of the city council are required to exercise their judgment in determining whether the improvement shall be made. The judgment which they exercise in ordering the improvement is not a determination of the rights of an individual under existing laws, but is the conclusion or opinion

which they form in the exercise of the discretionary power that has been intrusted to them, and upon a consideration of the public welfare and demands for which they are to provide. The discretion and opinion is a part of the legislative power that has been conferred upon the city, and is of the same character as that exercised by the legislature itself in providing for the general welfare of the state, and is equally independent of supervision by the judiciary. The adoption by the city council of an order for the improvement of a street is not in the nature of a judgment which is binding upon the city, but is merely the declaration of a purpose, and is only a step taken by it in the contemplation of the improvement, from which it may recede at any time before the contract for the improvement has been awarded. The fact that a public agent exercises judgment and discretion in the performance of his duties does not make his actions or powers judicial in their character. *People v. Walter*, 68 N. Y. 403; *People v. Board of Commissioners, etc.*, of New York City, 97 N. Y. 37; *In re Wilson*, 32 Minn. 145, 19 N. W. 723. The distinction between a judicial and a legislative act was pointed out by Field, J., in the Sinking Fund cases, 99 U. S. 761, as follows: "The one determines what the law is and what the rights of parties are with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it." In *People v. Oakland Board of Education*, *supra*, this rule was adopted by this court as correct, and it was said with reference to the matter then before the court "The board acted upon the proposition before it as one of policy or expediency, aiming to adopt that which in its judgment would be best for the constituency which it represented. Its action was then political or legislative, and was in no proper sense judicial in its character. It is conceded that the board exercised its judgment in the action which it took, but this it was called to do in the exercise of its legislative functions. It is apparent that the exercise of judgment is not the criterion by which this proceeding must be viewed to determine its character. To render it the exercise of a judicial function, its judgment must act in a matter which is judicial in the sense above indicated." In the opinion given by Mr. Justice McKinstry in *Spring Valley Water Works v. Bryant*, 52 Cal. 132, this subject received an extended examination, and it was said: "From the foregoing and other cases heretofore decided it sufficiently appears that it has always been considered by this court that the office of *certiorari* is to bring here for review the proceedings of governmental boards exercising a mixed authority, only when the matter is one in which they have acted judicially." See, also, *People v. Supervisors of St. Lawrence County*, 25 Hun 131; *In re Mt. Morris Square*, 2 Hill 14; *People v. Board of Health of New York City*, 33 Barb. 344; *People v. Board of*

Supervisors of Livingston Co., 43 Barb. 232; *Townsend v. Copeland*, 56 Cal. 612. Under the provisions of the street assessment act, the proceedings of the city council for the improvement of a street—the resolution of intention, the order directing the improvement, the invitation for proposals, the award of the contract—are all legislative in character. With the award of the contract, unless there shall afterwards be an appeal from some act of the superintendent of streets, the functions of the council cease, and those of the superintendent begin. His acts—the entering into the contract, the acceptance of the bond, the fixing the time for performing the contract, the acceptance of the work and the making of the assessment—are ministerial in their character, and do not call for the exercise of judicial functions.

Although the question has not been discussed by counsel, we do not wish to be understood as sanctioning, even by silence, the practice herein adopted, by the plaintiff in joining in the writ the superintendent of streets and the contractor with the board of trustees. The statute provides that the writ is to be directed to the inferior tribunal, board or officer or to any other person having the custody of the record or proceedings, to be certified (Code Civil Proc. § 1070), and, as the review is limited to examining the jurisdiction of the board or officer to whom the writ is issued, there is a manifest impropriety in joining in the same proceeding tribunals or officers who exercise a jurisdiction separate and distinct from each other. Jurisdiction is, in its nature an entirety, and exclusive in the body or person upon whom it has been conferred; and a writ of *certiorari* directed to different officers having no joint or common duties but acting each independently of the other, is unauthorized. *People v. Walter*, 68 N. Y. 403; *Starr v. Rochester*, 6 Wend. 564. In the matter sought to be reviewed the functions of the superintendent of streets and of the board of trustees are entirely distinct, and that officer should not have been included in the writ. It is difficult to see upon what grounds the contractor was joined with the others, as no jurisdiction is exercised by him, and he did not even make any return to the writ. The superintendent of streets can exercise no jurisdiction until after the board of trustees have by their acts conferred such jurisdiction upon him, and the jurisdiction which he exercises is distinct from that exercised by the trustees. An appeal may be taken to them from the assessment made by him, and from other acts or determinations of his. Upon such appeal the city council for the first time exercises judicial functions (see *Barber v. San Francisco*, 42 Cal. 630); but the making of the assessment by the superintendent is but a clerical or ministerial act. Under the system adopted in this state the assessment consists merely in an apportionment of the expenses of the work upon the land fronting thereon. The rule for this apportionment has been fixed by the

legislature, and the superintendent of streets, in making this assessment, is not in the exercise of any judgment or discretion, but merely performs the clerical functions of making an arithmetical computation of the amount to be charged against each lot. *Bolton v. Gilleran*, *supra*. The cases cited from other states, where the assessment on each lot is to be made according to the benefits which that lot has received from the improvement, and in which it has been held that the parties to be affected by his acts are entitled to notice, and an opportunity to be heard before a legal charge can be made against their property, are, therefore, inapplicable. The statute, moreover, provides for an appeal to the city council from the act of the superintendent in making the assessment, and thus by express terms takes away the right to invoke the aid of a court to set aside the assessment by means of a writ of review. *Wright v. Commissioners*, 150 Ill. 138; 36 N. E. 980; *People v. Thayer*, 88 Hun. 136, 34 N. Y. Supp. 592. In the present case, such appeal was taken, and the assessment affirmed. The judgment is reversed and the superior court is directed to dismiss the writ.

PEOPLE EX REL. HUNTING v. COMMISSIONERS OF
HIGHWAYS OF EAST HAMPTON.

1864. COURT OF APPEALS OF NEW YORK. 30 N. Y. (3 Tiffany) 72.

(APPEAL from a judgment of the superior court affirming the proceedings of defendants for the removal of obstructions of a highway in said town. The *certiorari* was directed to one Conklin and five others, naming them as jurors, who had as between defendants and relator determined and found that said relator's fences encroached on said highway. To the writ, Conklin, as foreman of said jury, made a return setting forth the proceedings and the finding of said jury.)

JOHNSON, J.—The proceedings to remove encroachments upon a highway in the counties of Suffolk, Queens and Kings, under the act of 23d of February, 1830, applying to these counties exclusively, are identical with the proceedings for the same purpose in other parts of the state, under the revised statutes, except that in the first named act only six jurors out of twelve summoned are drawn to serve as the jury and try the question.

The object which the relator sought to accomplish by the writ of *certiorari*, and proceedings under it, was to procure a reversal of the order of the commissioners of highways, ordering the removal of the relator's fences, as an encroachment, and the subsequent proceedings under that order. In order to do this, it was necessary

that that order should have been brought up and made part of the record. That order lay at the foundation of all of the proceedings, and unless brought up by the return, the entire end and aim of the *certiorari* must fail necessarily. Of course this order could not be brought up on a *certiorari* directed to the jury. They had no custody of it. It did not belong to them or remain with them, and they could make no return of it. It is quite apparent that the jury is not the body to which a *certiorari* should be directed in such a case. They merely come to try a disputed question of fact between the commissioners and the occupant of the land, upon evidence produced before them by either party litigant, and certify their finding. The certificate is to be filed in the town clerk's office, and that is an end of their power and authority in the matter. No part of the record belongs to them, or remains with them, and they can return nothing other than what has been returned here, a mere narrative of the proceedings before them. This is no record, in any legal sense, of the proceedings by which the relator's fence was determined to be an encroachment. A *certiorari* does not lie to an inferior tribunal except to remove proceedings which remain before it. (The People v. Supervisors of Queens, 1 Hill 195). The writ in question did not properly bring up this certificate of the finding of the jury, even. They were no longer a legal body, after their verdict or finding was signed, and they had separated but mere individuals. All their official functions had ceased entirely. And a return signed by one of their number, several months afterwards, was no return of the jury as a body or tribunal. In such a proceeding there is no such officer as a foreman, authorized to represent the panel of jurors, and act for them. Where the writ of *certiorari* is improperly directed, or returned, nothing can be removed by it. (Bac. Abr. *Certiorari*, I. Peck v. Foot, 4 How. Prac. Rep. 425.) The writ having been erroneously directed, and the return a nullity, as most obviously it is, the supreme court acquired no jurisdiction over the subject matter. There was nothing before it to reverse or affirm. The defendants seem to have appeared and defended their proceedings as commissioners, though the writ was not directed to them, nor were they required by it to appear or answer. It is difficult to see how they could become parties. But no question of this kind seems to have been raised, on either side, and the proceedings were affirmed in favor of the defendants. The relator has mistaken evidently wholly the office of this writ, which is merely to bring up the record of the proceedings, to enable the supreme court to determine whether the inferior tribunal has proceeded within its jurisdiction, and not correct mere errors in the course of the proceeding. Here the object seems to have been to bring into review the alleged erroneous rulings of the jury in receiving or rejecting evidence offered on the hearing

before them, as though it were a bill of exceptions. Such questions do not arise and cannot be reviewed on *certiorari*. (Birdsall v. Phillips, 17 Wend. 464.) It is evident enough that both the defendants and the jury had jurisdiction in the matter before them. But the proceedings not being before the supreme court, there was nothing for them to affirm. Their judgment should have been a dismissal of the writ, or that the relator take nothing by it.

The judgment of the supreme court, must therefore, be reversed and the cause remitted to that court, with directions to dismiss the proceedings, but without costs to either party.

All the judges concurring, judgment accordingly.

SWIFT, RECORDER OF THE CITY OF DETROIT v.
WAYNE CIRCUIT JUDGES.

1887. SUPREME COURT OF MICHIGAN. 64 Mich. 479; 31 N. W. 434.

CAMPBELL, C. J.—A writ of *certiorari* was issued by the circuit court for the county of Wayne to review the conviction in the recorder's court of Detroit for an alleged violation of a city ordinance. The recorder applies to us for a mandamus or prohibition to prevent the circuit court from exercising this jurisdiction. The whole question turns on the inquiry whether the recorder's court of Detroit, acting in the particular case in controversy, is a court inferior to the circuit court.

The constitution of Michigan in terms gives to the supreme court a general superintending control over all inferior courts, with power to issue writs of error, and other writs named, both original and appellate. Art. 6, § 3. By section 8 of the same article the circuit courts are given general civil and criminal jurisdiction, except as otherwise provided, and appellate jurisdiction and supervisory control over all "inferior courts and tribunals," within their jurisdictions. By section 1 "the judicial power is vested in one supreme court, in circuit courts, in probate courts, and in justices of the peace. Municipal courts of civil and criminal jurisdiction may be established by the legislature in cities." By section 15, the supreme, circuit and probate courts are declared to be courts of record, and required to have a common seal.

A preliminary question is what is meant in this constitution by the term "inferior courts?" The relator's argument is largely based upon what counsel would suppose to be the common law definition of an inferior court, which means a court which is not one of the four great courts of the realm; that is, the court of chancery and the three great common law courts sitting at Westminster. Toml.

Law Dict. "Inferior Courts." Another less accurate distinction is found in the distinction between courts of record, whose records establish themselves, and are valid judgments in themselves, and courts not of record, proceeding under special conditions, whose jurisdiction is not presumed. The recorder's court is a court of record by name, and, so far as it has common law powers, its records are treated as common law records. But it also has special and peculiar powers, where its records are open to the more or less limited objections allowed by all jurisprudence in such peculiar cases. And it is very well known that in England there have always been many courts, not sitting at Westminster, whose records are respected. The term "inferior" is not of one single meaning in law, but is used in different senses. Under the constitution of the United States, congress has no power to create courts which are not inferior to the supreme court. The cases cited by counsel from decisions of that court do not claim that the circuit and district courts are not inferior to the supreme court, but that, being courts of general powers and of record, they are not inferior courts in the sense in which that word is sometimes used to distinguish courts among themselves after their kind. In England, error lay to the common plea out of the king's bench, making the former in our constitutional sense, inferior to the latter; while both ranked as superior courts. So all of them were subject to review by the exchequer chamber, and that by the house of lords. Our American constitutional use of the word refers to relative rank and authority, and not to intrinsic quality. Under our own constitution, as under that of the United States, the supreme court could have no appellate power or supervision over the circuit courts except on this idea that they are inferior to it, for none but inferior courts are subjected to it, and the jurisdiction of our circuit courts equals that of the English superior courts. And, if the argument for the secondary English rule is resting on the distinction between courts of record and others, both circuit and probate courts being declared courts of record, and not in terms made subject to the supreme court by the constitution, except as by their nature inferior to it, no supervisory power could exist in either supreme or circuit courts over the probate courts. Yet the latter have been made subject to the circuit court and continue so, and their powers are subject to legislative control. They are not common law courts of record.

There is, however, a significant difference between the supreme and circuit courts in regard to the scope of their supervisory jurisdiction. The circuit court has not been given any express power to issue writs of error, which are the only writs adapted to reviewing ordinary common law judgments. In the charter of Detroit the only proceedings in the recorder's court expressly provided for as appealable to any other court are required to be removed to the

supreme court by "writ of error or other process, in the same manner that like proceedings may by law be removed to the supreme court from the circuit courts of the state." Laws 1883, § 241. On examining the charter, it will be found that these courts have no like proceedings with the circuit courts, except in common law cases. Special proceedings are always statutory, and must be conducted where the statute places them, and the circuit courts have no jurisdiction over ordinance cases under their original powers.

The charter unquestionably puts the criminal business, and the street and alley cases, expressly beyond the jurisdiction of the circuit court, either original or appellate. The real controversy is whether the fact that a part of its jurisdiction is exempt from circuit court supervision prevents the recorder's court from being inferior to the circuit. The primary purpose of the recorder's court was to serve as an agency of the city in enforcing the bylaws and ordinances and other municipal business. It succeeded to the mayor's court, which, by the charter of 1827, if not earlier, was made a court of record, and vested with all the ordinary powers of the present recorder's court, except its jurisdiction over crimes. By that charter, and amendments to it, the mayor's court was given a very large common law jurisdiction of all civil cases arising within the city, in which the city was a plaintiff, and these cases were required to be tried according to the rules governing the circuit courts. Section 3 of act of April 13, 1841. Nevertheless in spite of its character as a court of record trying and adjudicating these common law issues, without reference to their magnitude, which might include many thousand dollars, and which in their nature were of as high a nature as indictments, an appeal lay to the circuit court of Wayne County, subject to the rules governing appeals from justices. Section 4, 1841:

In *Welles v. City of Detroit*, 2 Doug. (Mich.) 77, an attempt was made by the city to prosecute a debtor by attachment proceedings in the mayor's court, claiming that in common law city causes it had the same jurisdiction as the circuit, but the judgment was taken directly to the supreme court by *certiorari*, and not by writ of error, where it was held that the civil jurisdiction of this court was limited as expressed, and could not be extended by construction so as to embrace this extraordinary remedy, which in terms was allowed to circuit courts by name, and the proceedings were quashed.

Under the old constitution, which did not define or grant jurisdiction to the circuit courts, but left all but the supreme court to be provided for at discretion, the circuit courts had their whole appellate power provided for by statute. The mayor's court was not only put under the circuit court, but its judgments were all open to appeal and retrial on the merits. The supreme court alone could issue writs of error and *certiorari* under its common law juris-

diction. Under the constitution of 1850, as already seen, the circuit courts were empowered to issue writs of *certiorari* in the exercise of their supervisory control. In the circuit court acts no provision was made for the writ of *certiorari*, except in special cases, and it seems to have been supposed the power was entirely statutory. But when the question was brought into this court, it was held that the right to issue a common law *certiorari*, being given by the constitution, could not be taken away by statute, and existed in the circuit courts as an inherent power. *Thompson v. School District No. 6 of Crockery*, 25 Mich. 483; *Taylor v. Judge of St. Clair Circuit*, 32 Mich. 95; *Merrick v. Township Board*, 41 Mich. 631; s. c. 2 N. W. 922; *Wilson v. Bartholomew*, 45 Mich. 41; s. c. 7 N. W. 227.

In 1857 the charter of Detroit was revised and reenacted, and then, for the first time, the recorder's court was provided for, to succeed and carry out the powers of the mayor's court substantially as before; but it was also to have exclusive jurisdiction for the trial, but not for finding of indictments, of all indictable crimes committed in the city of Detroit. In the trial of these cases, and in reviewing them, the general laws of the state, as provided for the circuits, were made by the charter to apply, and, as already suggested, the removal to the supreme court was to be in the same way provided for like cases in the circuit courts. Charter, c. 6, § 24, and subsequent sections *passim*. In this charter the system of procedure for other cases was otherwise regulated, and the jurisdictions were kept separate, not only in beginning suits and issuing process, but also in employing city officers for city cases, and the local criminal officers representing the ordinary criminal authority for criminal cases. In a recent revision of the charter, in which these matters were partially confounded, so as to give as was claimed, exclusive and different methods of prosecution and complaint to the recorder's court, we held there was no such distinction, and the amendment as far as attempting it, invalid. *Prosecuting attorney v. Judges of the Recorder's court*, 26 N. W. 694.

There can be no doubt that, at least up to 1857, the mayor's court was legally regarded as an inferior court, subject to the review of the circuit. It is equally clear that the recorder's court is the same court, with an enlarged jurisdiction. It is also apparent that in giving the broader jurisdiction, not only where its methods and conditions in the new jurisdiction prescribed, but special provisions were made for a review of the judgments rendered under it. No provision whatever is expressly made for the review of the action of the court under the ordinances. It was claimed, in a litigation that arose in an ordinance case several years ago, that the section which gives the jurisdiction on appeal to supreme court on convictions, in analogy to circuit court cases, of similar character, constructively applied to convictions under ordinances. But in the

several controversies which came up consecutively between the city and the same citizen for an alleged illegal closing of an alley, the double character of the recorder's court, and of appellate proceedings from it, was pointed out and distinguished.

In *People v. Jackson*, 7 Mich. 432, respondent had been convicted by the recorder's court, under a regular criminal information, for closing the alleged alley, and the case was properly brought up before sentence, and decided here on the exceptions. But the case was held to involve no criminal offense, and the conviction was set aside for that reason. Thereupon the city prosecuted him under an ordinance intended to cover the case, and he was again convicted. The recorder undertook to reserve the questions for consideration by this court, as could have been done under the criminal practice, and reliance was had on the clause of the charter before referred to as regulating removals to this court. The court held, that when he tried cases under the ordinances, he was acting merely as municipal officer, enforcing regulations of which we could not take judicial notice, and that no cases could be reserved except where he performed the functions of a circuit judge under the laws of the state. The proceeding was therefore dismissed. A second attempt was made in the same case to bring it up on exceptions before judgment. *People v. Jackson*, 8 Mich. 110. This was dismissed on the same ground, and the double character of the court was again fully discussed, and the charter construed, as before, as keeping the two jurisdictions separate. It was brought up a third time on writ of error (*Jackson v. People*, 8 Mich. 262), and dismissed again as not subject to writ of error. It was last brought up on *certiorari* (*Jackson v. People*, 9 Mich. 111), when the conviction was quashed for excess of jurisdiction in attempting to decide by a municipal court a controversy which involved rights that could only be determined by the laws and courts of the state.

We have found no authority for holding that a municipal court changes its relative position to other courts by becoming invested with new powers which those courts cannot review. Such instances are by no means rare, and it has always been found possible to keep the two powers distinct. All common law courts of record in the United States have been given certain powers under the naturalization laws of Congress, but this has never been supposed to bring that jurisdiction under the control of state appellate courts. The supreme court of the United States has recognized the existence of special powers granted to circuit and district courts as outside of its judicial cognizance. *U. S. v. Feriera*, 13 How. 40.

In *Auditor General v. Pullman Palace Car Company*, 34 Mich. 59, where the circuit court of Ingham county was given jurisdiction of appeals from the auditor general in certain cases, we held that the proceeding was aside from the ordinary judicial jurisdiction and therefore not subject to our review in any shape.

In *Southwick v. Postmaster General*, 2 Pet. 442, the case was quite parallel with this. There was a suit brought in the district court of the United States having circuit court powers at common law, and judgment was rendered, which was removed regularly by writ of error to the circuit court of the same district, where it was affirmed. A writ of error was then taken from the circuit court to the supreme court. Under the act of congress the district court had been empowered to act in such cases either as a district or a circuit court, and it did not appear on the record in which capacity it acted. If acting as a Detroit court, the action of the circuit court on error could not be reviewed by the supreme court. If acting as a circuit court, the decision of the regular circuit court on error from it could be reviewed by the supreme court. Chief Justice Marshall held it must be presumed to have been acting as a district court, and so the writ of error was dismissed. He said: "Had the court for the northern district of New York possessed no circuit powers, it could still have taken cognizance of this cause. By conferring on it the powers of a circuit court, congress has added nothing to its jurisdiction in this case. In taking cognizance of it, a district court has exercised the ordinary jurisdiction assigned to that class of courts. No extraordinary powers were brought into operation. We cannot say that a district court, performing the appropriate duty of a district court, is sitting as a circuit court because it possesses the powers of a circuit court also."

The fact that the recorder's court acts as a state criminal court in criminal cases does not make it any the less a city court in city cases. It has already been decided that these ordinance cases involve not state law, but city law, and must be reviewed on *certiorari*. So far as these cases are concerned, the charter has not been substantially changed, and there is no reason to suppose the legislature meant any change. The remedy by appeal has been dropped very wisely, as state courts are not designed to act as municipal courts; but no interference has been had to provide any other remedy, so that the *certiorari* is the only one to be used. The review of such cases is as appropriate for the circuit court now as it was prior to 1857. It is plain enough that a municipal court is presumptively inferior to a circuit court, so far as its jurisdiction is not of equal character. We can see no difficulty whatever in separating the two jurisdictions. That separation exists in the circuit courts themselves, between law and equity, between civil and criminal jurisdiction, between original and appellate jurisdiction.

We think the *certiorari* was properly issued, and the application of relator must be denied. No costs will be awarded, as the relator acts officially in an entirely proper effort to have his duty defined.

(The other justices concurred.)

See also *State v. Harrison*, 141 Mo. 12; *People v. Hoffman*, 166 N. Y. 462; *State v. Judge*, 40 La. Ann. 434; *Locke v. Lexington*, 122 Mass. 290; *Wilson, In re*, 32 Minn. 145; *People v. Betts*, 55 N. Y. 600; *Jordon v. Hayne*, 36 Iowa, 9; *Merrick v. Arbela*, 41 Mich. 630; *Roanoke, Ex parte*, 117 Ala. 547; *Archie v. State*, 99 Ga. 23; *State v. Timme*, 70 Wis. 627; *Derlin v. Dalton*, 171 Mass. 338; *Jaquith v. Hale*, 31 Mich. 430; *People v. Medical Society*, 84 Hun (N. Y.), 448.

In New Jersey the writ has been granted to test the validity of an ordinance providing for the payment of an officer's salary. But this cannot be considered other than as an unwarranted extension of the true functions of the writ. See *Christie v. Bayonne*, 64 N. J. L. 191.

In *Peters v. Peters*, 8 Cush. (Mass.) 529, the writ was refused by Shaw, C. J., to the probate court on the ground that there was no supervisory jurisdiction by *certiorari* over ecclesiastical courts. But it is the practice in many states to bring probate proceedings up for review by *certiorari*. *Boynton, Ex parte*, 44 Ala. 261; *Glover v. Reid*, 80 Mich. 228; *State v. Probate Court*, 51 Minn. 241; *Derton v. Boyd*, 21 Ark. 264; *Coupland v. Tullar*, 21 Tex. 523; *State v. Jackson*, 93 Mo. App. 516.

3. Existence of other remedies.

LYNCH v. CROSBY ET AL.

1883. SUPREME JUDICIAL COURT OF MASSACHUSETTS. 134 Mass. 313.

MORTON, C. J.—This is a petition for a writ of *certiorari* to be directed to the judge and clerk of the Police Court of Lowell. The writ is sought not to be used as ancillary to any other process, but for the purpose of quashing the proceedings of the said police court in issuing a search warrant for the seizure of intoxicating liquors. A writ of *certiorari* lies only to correct the errors of inferior courts, or officers acting judicially, in proceedings not according to the course of the common law. It does not lie to revise the acts of a court whose procedure is according to the course of the common law, and whose errors can be corrected by appeal or exceptions, or by a writ of error. Gen. Stats. c. 145, § 8. Pub. Stats. c. 186, § 7. *Farmington River Power Co. v. Commissioners*, 112 Mass. 206. *Tewksbury v. County Commissioners*, 117 Mass. 563. Police courts are courts of record, of common law jurisdiction, civil and criminal. In receiving complaints and issuing warrants for the seizure of intoxicating liquors illegally kept, they proceed according to the course and principles of the common law. Any decisions of the court may be appealed from. At the trial in the superior court, any legal objections to the complaint and warrant may be taken and are the subjects of appeal or exceptions, or in a proper case, of a writ of error. Though the cause for the search and seizure did not exist at common law, but is created

by statute, this is immaterial. The procedure to enforce the statute is according to the course of the common law, in the same manner as are proceedings by indictment and trial for any new offence created by statute.

Without considering other objections to the petition, we are therefore of the opinion that the court has no jurisdiction to issue a writ of *certiorari* in the case before us. Petition dismissed.

MARGARET ENNIS v. LAWRENCE M. ENNIS.

1884. SUPREME COURT OF ILLINOIS. 110 Ill. 78.

MR. JUSTICE SCOTT delivered the opinion of the court.

The petition in this case was presented by Margaret Ennis in the circuit court, and was for a common law writ of *certiorari*, to bring before that court certain proceedings had in the probate court of Cook County, that the same, on inspection, might be quashed and held for naught. It appears from the allegations it contains, that the petitioner was lawfully married to James Ennis, since deceased, who at the time of his death left him surviving the petitioner, his widow, and nine children by a former marriage, and one child by his marriage with petitioner, all of whom were minors at the time of his death, except perhaps, one or two of his first children, and who resided with him and constituted a part of his family; that afterwards such proceedings were had in the probate court that letters of administration were granted the petitioner and Lawrence M. Ennis, and on appraisers being appointed, as the law directs, they set apart the "widow's award," in value \$1,960. The grievance alleged is, that subsequently, on the third day of June, 1881, the probate court "divided" or "apportioned" the "widow's award," giving to petitioner and her child by her marriage with James Ennis, since deceased, \$750, and to the seven minor heirs of her deceased husband, \$1,210. It is that order of the probate court so entered that petitioner seeks to have quashed and held for naught in this proceeding. It is thought this cannot be done on a common law writ of *certiorari*. The proper remedy for a party aggrieved in such case would be on appeal to the circuit court. Undoubtedly the probate court has general jurisdiction in all matters touching the settlement and administration of the estates of deceased persons, and orders concerning the "widow's award" come within the scope of that general jurisdiction. It is not necessary now to consider whether the probate court proceeded irregularly in making the order complained of, as that question cannot be adjudicated in this proceeding. The law is, a common law writ

of *certiorari* will lie only to inferior tribunals or jurisdictions in cases where they proceed illegally, as it is alleged the probate court did in this instance, where no appeal or mode of directly reviewing their proceedings is provided or exists under the law. (Miller v. Trustees of Schools, 88 Ill. 26.) In cases like the one being considered, the statute has expressly given a remedy for any error committed by the probate court, by an appeal to the circuit court, as this court has decided in Ennis v. Ennis, 103 Ill. 95. The writ of *certiorari* was therefore properly quashed, as was done by the circuit court. * * *

The judgment of the appellate court will be affirmed.

Judgment affirmed.

HAUSER ET AL. v. STATE OF WISCONSIN.

1873. SUPREME COURT OF WISCONSIN. 33 Wis. 678.

LYON, J.—An information was duly filed in the Milwaukee municipal court, by the district attorney, against the petitioners, charging them with having published a certain false, scandalous and malicious libel upon the "School Sisters of Notre Dame," a corporation created by and existing under the laws of this state.

The petitioners moved the municipal court to quash such information, for the reason (among others) that the publication of a libel upon a corporation is not a criminal offense. The court overruled such motion, whereupon the petitioners applied to a justice of this court to allow a writ of *certiorari* to the municipal court, to bring up the record of the proceedings in that court against the petitioners, for review by this court. The writ was allowed, issued and served, and due return has been made thereto.

The district attorney, on behalf of the state, now moves to quash or supersede the writ.

It is well settled by numerous adjudications of this court that, in this state, upon *certiorari* to an inferior court, the court out of which the writ issues will only inquire into errors or defects which go to the jurisdiction of the court below, and for all other errors or irregularities the party aggrieved must resort to his remedy by appeal or writ of error. The rule has been more frequently applied where the writ has been sent to a justice of the peace, but it is equally applicable to any case where the writ issues to a court which proceeds according to the course of the common law, whether of record or otherwise. The existence and binding force of this rule were freely admitted by at least one of the learned counsel for the petitioners, on the argument of this motion.

Granting, for the purpose of argument, that a corporation **cannot** be the object of a criminal libel, and that the municipal court erred in holding to the contrary, the question to be determined is whether such error is jurisdictional.

The municipal court has jurisdiction to hear, try and determine criminal prosecutions for libels. This necessarily includes jurisdiction to hear and determine motions to quash informations therefor, and to determine whether the information, in a given case, does or does not charge that the accused has committed a criminal offense. In this case the municipal court had jurisdiction of the persons of the petitioners, and in a regular proceeding in the case, it determined that the information charges that the defendants published a criminal libel. Conceding this determination to be erroneous, is the error a jurisdictional one? It may be so, in the sense that no court has jurisdiction to make a wrong decision; but it is a jurisdictional error in that sense which will authorize this court to review and correct it on *certiorari*? Is it not perceived that this case differs on principle from any other criminal prosecution in which the indictment or information fails, for any reason, to show, by apt and proper averments, that a criminal offense has been committed; or from a civil action, the complaint in which fails to state facts sufficient to constitute a cause of action. Should the court hold erroneously that the indictment or information charges a criminal offense, or that the complaint states a cause of action, if it has jurisdiction of the person of the defendant and of the subject matter of the action, it will not be claimed that, as a general rule, the supervisory court will review the case and correct the error on *certiorari*. And why not? Plainly because the error is not a jurisdictional one. Suppose a complaint fails to state a cause of action, and an objection to the admission of any testimony under it is erroneously overruled. Will it be claimed that such error can be corrected on *certiorari*? Of course not. And yet there is no element of jurisdiction or want of jurisdiction involved in the alleged error in this case, that is not also involved in the case supposed. * * *

Further discussion seems unnecessary. We conclude, as the court did in principle, at least in *Arnold v. Booth*, 14 Wis. 180, that the question arising upon the record is not one really going to the jurisdiction of the municipal court, but is whether, in fact, the petitioners are charged in the information with having published a criminal libel. They claim that they are not thus charged, while the counsel who represent the state claim, and the municipal court holds, that they are thus charged. Upon this writ and in this proceeding (as we have endeavored to show), this court cannot properly decide the controversy. We therefore refrain from expressing or intimating an opinion upon its merits. * * *

By the court.—The motion to quash the writ is granted, and the cause remitted for further proceedings according to law.

See also *Ransom v. Cummins*, 66 Iowa 137; *Ray v. Parsons*, 14 Tex. 370; *Dean v. State*, 63 Ala. 153; *State v. Cohen*, 13 S. Car. 198; *McNaughton v. Evert*, 116 Mich. 141; *State v. St. Paul*, 104 La. 103; *Noble v. Superior Court*, 109 Cal. 523; *National Bank v. City of Elmira*, 53 N. Y. 49; *Kern v. Foster*, 16 Ohio 274; *State v. Shelton*, 154 Mo. 670; *Reynolds v. West Hoboken*, 63 N. J. L. 497; *White v. Wagar*, 185 Ill. 195; *State v. O'Neill*, 104 Wis. 227; *Weed v. Lewis*, 80 Md. 126.

4. Adequacy of other remedies.

HENRY ROSER, NEXT FRIEND OF NEGRO WOMAN ANTOINETTE
ET AL. V. MARLOW ET AL., EXECUTORS, ETC.

1837. SUPERIOR COURT OF EASTERN DISTRICT OF GEORGIA. R. M.
Charlton, 542.

(APPLICATION for *certiorari* to review the decision of the court of ordinary in refusing to allow probate of will directing the emancipation of certain slaves.)

CHARLTON, J.—(After stating the facts.) * * *

* * * I cannot accede to the truth of the proposition, (advanced by the counsel for the executors, who resist this application), which denies that a *certiorari* can issue, to bring up a decision of the court of ordinary. It is true that under the constitution of our state, an appeal is allowed from the decisions of that court to the superior court, and the act of 1805, (Prince's digest, 166) provides, for the manner in which that appeal shall be entered; but the constitution also declares, that the "superior courts shall have power to correct errors in inferior judicatories by writ of *certiorari*." There is nothing in the constitution or laws of our state, which prohibits a *certiorari* from being issued, because an appeal is given from the same tribunal to which it issues. The Judiciary Act of 1799 provides, both for an appeal and a writ of *certiorari*, from the inferior court. The nature of the two remedies is well understood, and one of the distinctions which has been drawn between them is, *that an appeal can only be had when it is expressly given, and a certiorari always lies, unless it has been expressly taken away.* (2 Chitty's gen. prac. 374, 5.) "Where any court is erected by statute, a *certiorari* lies to it." (1 Ld. Raymond 469. *Groenvelt v. Burwell*, s. c. 1 Salk. 144.)

This point has been determined by one of my predecessors in the case of *McCaskill v. McCaskill*, (T. U. P. Charlton's Rep 151),

and the language used is, "the party has now his election either to apply for a *certiorari* upon the basis of error, or to appeal. The judgment of this court upon the first must be error, or no error, upon the latter, an affirmance or reversal of the inferior judiciary."

* * *

Certiorari to issue as prayed for.

MEMPHIS & CHARLESTON RAILROAD COMPANY v.
BRANNUM.

1892. SUPREME COURT OF ALABAMA. 96 Ala. 461; 11 South, 468.

THORINGTON, J.—The case originates from a suit commenced in the court of a justice of the peace, wherein appellee had a summons issued to "Thomas G. Morrow, as agent of the Memphis & Charleston R. R." and the complaint filed has the following caption: "Jas. C. Brannum v. M. & C. R. R." The summons was indorsed "Summons T. G. Morrow, as agent." "Executed July, 1889." The docket of the justice contains the following entries: "July 18th. Summons and subpoenas returned executed." "July 27. Continued by defendant until Sep. 2, 1889." It further shows a judgment by default, entered Sep. 2, 1889, against "defendants." On the 6th day of September, 1889, before the expiration of the time allowed by law for appeals from judgments of a justice of the peace, the Memphis & Charleston Railroad Company applied for and obtained from the judge of the eighth circuit a common law writ of *certiorari*, returnable into the circuit court of Madison County, by which the records and proceedings before the justice were returned into that court, where, on motion of appellee, the writ of *certiorari* was dismissed, and judgment for costs rendered against appellant and the sureties of his *certiorari* bond, and from that judgment this appeal is taken. * * *

(The court, after holding that service of summons in said suit was not according to law, proceeded:)

* * * "*Certiorari*, at common law, is an extraordinary legal remedy. It can only be invoked when there is a legal right and no other legal remedy. When an appeal lies, *certiorari* is not the proper remedy." The foregoing is a quotation from the opinion of Chief Justice Stone in the case of Railroad Company v. Christian, 82 Ala. 307, 1 South. 121. But the appeal here referred to is surely such an appeal as will be effectual to reach the defects complained of, or, in other words, it must afford an adequate remedy. This is manifest from what follows in the same opinion, where it is said: "What we do decide is that in cases where ample redress can be obtained

on a trial *de novo*, and the right of appeal is unobstructed, the conditions are wanting which justify a resort to this severe remedy; a clear legal right and no other legal remedy." The remedy by appeal from judgments of justices of the peace is afforded by section 3398 of the code, and on such appeals the case must be tried, "*de novo*, according to equity and justice, without regard to any defect in the summons or other process or proceedings before the justice." Code 1886, § 3405. The effect of this statute is such that, had the railroad company taken an appeal to the circuit court, such an appeal would have operated as a waiver of all defects in the summons, process and proceedings before the justice; and the defendant would have been compelled to litigate in the first instance in the higher and more expensive tribunal, without ever having had its day in the magistrate's court. This would not be in harmony with the policy of the law, which creates magistrate's courts for the speedy and inexpensive disposition of cases of minor importance, and would not be the ample redress necessary to be afforded by appeal in order to supply the place of the remedy by the common law *certiorari*. If this were a case in which it appeared from the record and proceedings of the magistrate's court that the justice acquired jurisdiction of defendant's person in any manner, however, irregular, we would be bound by the former decisions of this court to hold that the remedy by appeal was adequate, and that the common law writ of *certiorari* would not lie; but to so hold in this case, would in effect be to confer original jurisdiction on the circuit court in a case the law contemplates should originate in a magistrate's court, because the effect of such an appeal would be to compel the party appealing to try in the circuit court a case to which he had never been a party in the magistrate's court. Such a result we think justifies a resort to the "severe remedy" of the common law writ of *certiorari*, as it is characterized in the case of *Railroad Company v. Christian*, *supra*. In that case, this court held that the circuit judge did not err in refusing the writ; that the remedy by appeal was adequate, because the defendant could, on such appeal, raise the question of jurisdiction in the circuit court. But in that case the defect in the proceedings before the magistrate's court was want of jurisdiction of the subject matter, which could not be waived by appeal or otherwise; while in the case before us the want of jurisdiction is of the person, which the defendant could, by virtue of the statute, waive by taking the benefit of an appeal to the circuit court. The circuit court erred in dismissing the writ of *certiorari*, and its judgment is reversed and annulled. Judgment will be here rendered quashing the judgment in the magistrate's court, as prayed in the petition filed in the circuit court by appellant. Reversed and rendered.

STATE EX REL. HAMILTON V. GUINOTTE, PROBATE JUDGE.

1900. SUPREME COURT OF MISSOURI. 156 Mo. 513.

SHERWOOD, J.—The will of Thomas G. Hall was admitted to probate in the probate court of Jackson county, and letters testamentary without requirement of bond issued to his daughter and executrix, Maggie McCune. These things being done, relator brought suit in the circuit court of Jackson county to contest the will. A change of venue transferred this cause to the Cass Circuit Court. Pending this suit, the probate court appointed an administrator *pendente lite* of Hall's estate, and ordered the executrix to turn over the estate to him, which was done. The will contest in Cass county resulted in establishing the paper writing as the last will of Hall, and thereupon relator paid the costs, and appealed to this court but gave no bond; that appeal is still pending. Upon being advised of the result of the will contest in the Cass Circuit Court, the executrix applied to be reinstated in her former position; her application was granted and relator ordered to turn the estate over to her. To prevent execution of this order *certiorari* is prayed and a motion to quash that order interposed. * * *

(The court held that an order of the probate court revoking letters of administration, issued under R. S. Mo. sec. 13, 1889, made after the determination of a will contest in the circuit court, but pending an appeal therefrom, was erroneous; that when the suit contesting the validity of the will was transferred to the circuit court the probate court lost its jurisdiction to revoke letters of administration.) * * *

4. Having proceeded thus far, we come down to the question of the remedy employed in this case; is *certiorari* the proper remedy? There is no doubt but what an appeal would lie from the order of the probate court reinstating the executrix in her former position. (R. S. 1899, sec. 278.) And it has been broadly stated that *certiorari* will not issue where remedy exists by either appeal or writ of error. (State *ex rel.* Mo. & Kan. Coal R. R. Co. v. Shalton, 154 Mo. 670.) In State *ex rel.* Garth v. Switzler, 143 Mo. 287, however, where an appeal might have been had from the order of the probate court, *certiorari* was awarded and the cause heard and disposed of in this court.

But the statement that *certiorari* will not issue where either appeal or error goes, though frequently met with in text writers, and in some reports, is neither strictly true, nor accurate; there are marked exceptions. Thus where the exigencies of the case are such that the ordinary methods of appeal or error may not prove adequate either in point of promptness or completeness so that a partial or total

failure of justice may result, then *certiorari* may issue. (Harris, *Certiorari*, sec. 54.) *The rule that appeal or writ of error existing, bars certiorari, is subject to the qualification that such other means of redress, in order to form a bar, should be adequate to meet the necessities of the case.* Thus the right of appeal, while generally held an adequate means of correcting mere errors committed in the exercise of jurisdiction, may prove inadequate to redress or prevent a wrong done in the absence or excess of jurisdiction. (2 Spelling Extr. Relf. secs. 1918, 1963; Railroad v. Brannum, 11 S. Rep. (Ala.) 468; Vaughan v. Ashland, 37 N. W. (Wis.) 809; King v. Inhabit. 4 Maule & S. 378.)

In this regard, *certiorari* accomplishes in effect the same functions as does a court of equity where it interposes because the remedies at law are neither adequate, certain nor complete. But if the inferior court is guilty of proceeding in the absence or excess or usurpation of jurisdiction, then that court may be kept within proper bounds. State *ex rel.* v. Dobson, 135 Mo. loc. cit. 19 and cases cited. And *certiorari* is a summary and more effective remedy for judicial excesses than writ of error or appeal. 2 Spelling Extr. Relf. sec. 1890.

There are many authorities which hold that it is the inadequacy, and not the mere absence of all other legal remedies, and the danger of a failure of justice without it, that must usually determine the propriety of this writ. (Lagrange v. State Treas. 24 Mich. loc. cit. 477; Inhabitants of Cushing v. Gay, 23 Me. 9; Hopkins v. Fogler, 60 Me. 266; Spofford v. Railroad, 66 Me. 26; Edgar v. Greer, 14 Ia. loc. cit. 212; C. P. Railroad v. Railroad, 47 Cal. 528; People *ex rel.* v. Hill, 53 N. Y. 547; Knapp v. Heller, 32 Wis. loc. cit. 468.)

An adequate remedy is a remedy which is equally beneficial, speedy and sufficient, not merely a remedy which at some time in the future will bring about a revival of the judgment in the lower court complained of in the certiorari proceeding, but a remedy which will promptly relieve the petitioner from the injurious effects of that judgment and the acts of the inferior court or tribunal. (People *ex rel.* v. Commissioners, 66 How. Pr. 293; Kirby v. Sup. Ct., 68 Cal. loc. cit. 605; Havemeyer v. Sup. Court, 84 Cal. loc. cit. 398; People *ex rel.* v. Head, 25 Ill. 325; King v. Railroad, 2 B. & Ald. 646; People v. Mayor, 10 Wend. 395; People v. State Ins. Co., 19 Mich. loc. cit. 396; N. A. Dev. Co. v. Orman, 71 Fed. Rep. 764; Railroad v. Brannum, 96 Ala. 461; State *ex rel.* v. Elkin, 130 Mo. 90; State *ex rel.* v. Rost, 49 La. Ann. 1454; State *ex rel.* v. Hirzel, 137 Mo. 447; State *ex rel.* v. Aloe, 152 Mo. 466, and many other authorities.)

And it has often been decided by numerous and respectable authorities that the discretionary stage has passed, when the writ has issued and the record of the inferior court in response thereto has been certified; that it is then the duty of the court to hear and determine

the cause. (*Ex parte* Weston, 11 Mass. 417; Harris v. Barber, 129 U. S. loc. cit. 369; People v. Brooklyn Assessors, 39 N. Y. 81; People *ex rel.* v. Brooklyn Commissioners, 103 N. Y. 370; Farmington Water Co. v. Commissioners, 112 Mass. loc. cit. 212; Mayor of London v. Cox, 2 L. R. H. L. loc. cit. 280; West River Bridge Co. v. Dix, 16 Vt. 446; Trainer v. Porter, 45 Mo. 336; 2 Spell. Extr. Relf. sec. 1907; Inhabitants of Cushing v. Gay, 23 Me. 9.)

In this case the record being properly certified, the time for judicial discretion which we might have exercised in refusing the writ has passed, and in performance of our duty and in the exercise of our constitutional control over the inferior tribunals of the state, and finding from the inspection of the record that the probate court acted beyond and outside its jurisdiction in making the order reinstating the executrix, while the appeal was still pending, we grant the motion to quash that order. * * *

(Separate opinion of VALLIANT, J., is omitted.)

In accord.—Nevada &c. R. Co. v. District Court, 21 Nev. 409; Schuchman v. Commissioners, 52 Ill. App. 497; People v. Donohue, 15 Hun (N. Y.) 418; Kingsland v. Gould, 6 N. J. L. 161; Golding v. Jennings, 1 Utah 135; Oran Highway Com'rs v. Hoblit, 19 Ill. App. 259.

MATHIAS v. MASON, COUNTY DRAIN COMMISSIONER.

1887. SUPREME COURT OF MICHIGAN. 66 Mich. 524; 33 N. W. 412.

CAMPBELL, C. J.—In these two cases plaintiff in *certiorari* complains of certain irregularities which, if well alleged, and if so declared, he claims would avoid the assessments charged against him. The return takes some exceptions to his standing in court on the general merits, but shows further that he has paid the assessments under protest, and sued to recover back the money. As a *certiorari* is not a matter of right in these cases, it has generally been refused if other remedies are available, unless under peculiar circumstances. Here the plaintiff has elected another remedy, under which he can obtain full redress if the assessments are illegal, and if he has not paid them voluntarily. There would be no propriety in allowing him a double remedy, and he should be confined to the common law action he has chosen.

The writ must be dismissed, as improvidently granted.

(The other justices concurred.)

5. Not a writ of right.

INHABITANTS OF CUSHING v. GAY ET AL.

1843. SUPREME JUDICIAL COURT OF MAINE. 23 Me. 9, *loc. cit.*
II & 12.

WHITMAN, C. J.— * * * Writs of *certiorari*, it has been held, are grantable only at the discretion of the court, and are not allowed "*ex debito justitiæ*." Discretion, however, when exercised by a court, does not mean precisely what the word in common parlance would seem to import. A legal discretion is implied; a discretion to be exercised according to the rules of law. If the rights of a party have been infringed to his detriment, by the erroneous doings of an inferior tribunal, he may justly claim redress; and it will be the duty of a court to afford it to him. It is not the province of the court to undertake to presume, that it would be wiser for him to submit to the injury, or to conjecture that the public interest would be better promoted by an adjudication against him, and therefore that it would not be discreet to relieve him. If the petitioners are aggrieved by a proceeding clearly erroneous, and to their injury, they must not be denied a remedy. But if the error is merely in matter of form, and the exception purely technical, it would be no violation of their essential rights, if the court should withhold its interference. Again, if the error complained of exists, yet, in no wise operates to the injury of the party seeking the remedy, although it may be otherwise to some person who does not complain, the court may, in such case, with entire propriety, and in the exercise of a sound and legal discretion, refuse its aid. * *

KNAPP ET AL. v. HELLER, TOWN CLERK, ETC.

1873. SUPREME COURT OF WISCONSIN. 32 Wis. 467.

COLE, J.—This is a common law *certiorari* brought to review the action of the town board of Menominee in fixing the valuation of both personal and real property belonging to the plaintiffs in that town for the purpose of taxation. A motion was made to quash the writ on several grounds, only one of which do we deem it necessary to notice. It appears from the affidavits read in support of the motion to quash, that there was a large amount of personal property liable to taxation in that town which was not included in the assessment roll. And, on the hearing of the motion to quash, all proceedings in relation to the personal property belonging to the plaintiffs were discontinued, and the writ of *certiorari*, so far as

it related to the personal property, was, with the consent of the defendant, dismissed. But the court ordered that so far as the writ related to real estate the motion to quash should be denied, and on the final hearing set aside the valuation of the board of review of the real estate. It is now claimed that the writ in respect to the real estate should have been quashed also, because it appeared that the aggregate valuation of the personal property belonging to the plaintiffs which was liable to taxation in that town, was in fact placed enough below its true value to counter-balance any alleged overvaluation of the real estate, and therefore no actual injustice had been done the plaintiffs by the action of the board of review. The writ, it is said, is not one of absolute right, but one resting in the sound discretion of the court; and when it appears that no equitable grounds exist for issuing the same, it should in these tax proceedings be dismissed. We think this position is sound and must be affirmed. It is admitted by the counsel for the plaintiffs, that the writ is not one of absolute right, but that it is discretionary with the court to award it or not. And when it is granted to review the acts and proceedings of taxing officers, it would seem to be very proper for the court to inquire, in the exercise of a sound legal discretion, whether the rights of the parties suing out the writ have been injuriously affected by the information or error complained of, and whether the ends of justice require the interference of the court in this manner. If, for instance, the evidence shows that the personal property omitted from the assessment roll more than counterbalances any alleged overvaluation of the real estate, then it is very evident that no injustice will be done by permitting the valuation of the board of review to stand, since the plaintiffs will pay no more taxes in the aggregate than in equity they ought to pay. Of course if the plaintiffs had the right to prosecute this writ *ex debito justitiæ*, these inquiries could have no influence in deciding whether the writ should be quashed. We should then have to consider the case as one brought before us by writ of error, and pronounce judgment without regard to these considerations. But it seems to us it is quite analogous to a proceeding in equity to set aside a tax, where the court inquires whether any injustice has been done, and whether there is any equitable ground for interference. If there is not, the court will decline to interfere in the matter. And substantially the same rule should be applied on a common law writ of *certiorari* to review the proceedings of taxing officers. Even though an error has been committed, yet if it appears no injustice has been done, and that a party will pay no more taxes than in equity they ought to pay, the court should quash the proceedings. This view derives more or less support from the following authorities: *The People v. The Supervisors of Allegheny*, 15 Wend. 198; *The People v. The Mayor, etc., of New York*, 2 Hill, 10; *In the Matter of Mt. Morris Square*, *id.* 14; *The People v. Stilwell*, 19 N. Y. 531;

Cobb v. Lucas, 15 Pick. 1; **Rutland v. County Commissioners of Worcester**, 20 *id.* 71; *In re Lantis*, 9 Mich. 324. And we also think we ought to exercise a discretion, even after a return made or a motion to quash under our practice, and "examine all the circumstances, and if we find substantial justice has been done," dismiss the proceedings.

Upon considering the case upon the merits, we find that the plaintiffs claim that there was an overvaluation of their real estate to the amount of \$102,708. We are satisfied from the evidence that there was no such excess in the valuation as claimed by them. We do not think that it exceeded the amount of the personal property liable to taxation in the town of Menominee which the testimony shows was not included in the assessment roll. It is not necessary to presume that this large amount of personal property was fraudulently concealed by them from the knowledge of the assessor. It is sufficient to establish the fact that it was not listed for taxation by the plaintiffs, and was not included in the assessment roll. And if the amount of personal property omitted from the roll was sufficient to balance any excess in the valuation of the real estate, then substantial justice has been done, and the action of the board of review should be affirmed, even though they proceeded upon an incorrect rule in the valuation of the real estate. Of course it makes no difference that the proceeding relating to the personal property has been discontinued. The plaintiffs cannot have the advantage of this writ to set aside the action of the board relating to the real estate for error or mistake on their part, and still avoid the payment of taxes on the personal property, omitted from the assessment roll. The same order should be made as though there had been no discontinuance concerning the valuation of the personal property.

By the court.—The order of the circuit court, reversing and setting aside the proceedings of the board of review in respect to the real estate mentioned in the writ, is hereby reversed, and the cause remanded with directions to quash the writ and dismiss the case.

NEWELL ET AL. V. HAMPTON.

1893. COURT OF ERRORS AND APPEALS OF DELAWARE. 1 Marvel
1; 40 Atl. 469.

THIS was a writ of *certiorari* in an action by Thomas S. Hampton against Viola M. Newell and another, issued in vacation by the clerk of the court of appeals and errors to the superior court for Newcastle County. The cause of action in the superior court

was a mechanic's lien claim filed upon which a *scire facias* was issued. At the return term of said *scire facias*, the defendant appeared, and suffered judgment by default. Thereupon the plaintiff below issued his *levari facias*, whereupon the defendant below sued out of the court of errors and appeals, in vacation, a writ of *certiorari* to the superior court, and caused a citation to be issued to the plaintiff below, the defendant below having previously to the issuing of the writ given security, which was approved in vacation by the chancellor. At the return term of the *certiorari* and of the citation, the respondent caused an appearance to be entered for him in that court; and the defendant below filed exceptions; and also alleged diminution, whereupon the court of errors and appeals made an order, returnable to the next term, requiring all the proceedings below to be sent up. At the second term a motion was made by counsel for the respondent to quash the writ of *certiorari*, on the ground that it had been improvidently issued. Motion granted.

Per curiam.—The allowance of a writ of *certiorari* is a matter of sound judicial discretion. That it is not a matter of right necessarily follows from the fact that it may be denied in some cases, as where there is otherwise an adequate remedy, or the point involved is not a matter of any serious complaint or injury. So where substantial justice has been done, though the record may show the proceedings to be defective and informal, but only technical errors or inaccuracies appear. It is only where the writ is given as a statutory remedy for review that it issues as a matter of course. Accordingly it was held by this court in *Cook v. Electric Co.* (unreported), that where the writ had been issued, as it had in this case, without application to and leave granted by the court, it should be quashed. Where the writ has been improvidently issued, without application to the court, the defect is not cured by an appearance; and on the authority of *Cook v. Electric Co.*, it is ordered that the writ in this case be quashed.

SUMMERROW ET AL. V. JOHNSON, COUNTY JUDGE.

1892. SUPREME COURT OF ARKANSAS. 56 Ark. 85; 19 S. W. 114.

COCKRILL, C. J.—This is a petition to the circuit court of Cleveland county for a *certiorari* to quash the order of the county court directing an election for the change of the county seat of that county from Toledo. The court denied the use of the writ. Several irregularities in the proceeding of the county court are sought to be inquired into:

- .. 1. The court was justified in refusing to consider the questions for several reasons: (1) The petitioners are not shown to have

been parties to the proceedings they sought to quash. *Black v. Brinkley*, 54 Ark. 372, 15 S. W. 1030; *Burgett v. Apperson*, 52 Ark. 213, 12 S. W. 559. (2) If their interest in the proceeding was properly established, they show no excuse for not prosecuting an appeal. *Burgett v. Apperson*, *supra*. (3) If both of these objections were out of the way, the court's action would still be right. The writ of *certiorari* is not granted as of course, even at the suit of one whose right of appeal has been lost without laches. If public inconvenience would result from quashing the judgment complained of, the court may deny the writ. *Black v. Brinkley*, 54 Ark. 372, 15 S. W. 1030; *Moore v. Turner*, 43 Ark. 243. A party may be estopped by acquiescence from questioning a judgment void for want of jurisdiction. *Black v. Brinkley*, *supra*; *State v. Leatherman*, 38 Ark. 81. The court to which the application for the writ is made may hear testimony *de hors* the record to determine whether it is unwise to grant the use of the writ. *Burgett v. Apperson*, *supra*. In this case testimony was heard by the circuit court for that purpose, but it was not preserved by bill of exceptions, and is not, therefore, presented for our consideration. Affidavits, copies of records used as evidence, and depositions do not become part of the records in a law case, except through the medium of a bill of exceptions. About two years after the order for the election was made this petition for *certiorari* was presented. An election upon the question of the change of the county seat, and to what point, had been held by virtue of the order; a second election to determine which of the two places receiving the higher number of votes at the first election would be the county seat was subsequently held; a contest was had in the county court as to which of the two had received the highest number of votes at the second election; and an appeal and trial *de novo* of the same issue had been determined in the circuit court before Toledo assumed its present attitude. That much we can ascertain from the record. We need not stop to speculate as to what additional state of facts in the way of expenditures made by the county in providing a new court house and jail, the change of county officers from the old site to the new, and other changes the county court was authorized to make, may have been proved to the satisfaction of the court by the evidence considered by it at the trial, and not preserved by bill of exceptions. If anything were needed beyond the facts furnished by the record proper to justify the action of the court, the presumption is it was furnished by the evidence considered at the trial, and not preserved as part of the record.

2. The judgment of the county court ordering the election discloses no jurisdictional defect. It shows that petitions such as the statute requires were presented to the court to put in motion the machinery for a change of the county seat, and that the court

found, upon evidence adduced at the hearing, that each petition contained the requisite number of votes. The court's jurisdiction to make the order of election, therefore, attached, and if it be conceded that it erred in the exercise of its jurisdiction, the errors would not render the order void. But as the discovery of errors can now be of no benefit to the appellants, we decline to follow the argument of counsel for the purpose of detecting them. Affirmed.

See in general on the subject of discretion exercised in granting the writ—*Rutland v. County Com'rs*, 20 Pick. (Mass.) 71; *Lyman v. Town of Burlington*, 22 Vt. 131; *People v. Drain Com'rs*, 40 Mich. 745; *Furbush v. Cunningham*, 56 Me. 184; *Duggen v. McGruder*, Walker (Miss.) 112; *Strobach, Ex parte*, 49 Ala. 443; *People v. Hill*, 53 N. Y. 547; *Ewing v. Thompson*, 43 Pa. St. 372; *State v. Blauvelt*, 34 N. J. L. 261; *Woodworth v. Gibbs*, 61 Iowa 398; *People v. Trustees*, 42 Ill. App. 650; *Pearce, Ex parte*, 44 Ark. 509; *Welch v. County Court*, 29 W. Va. 63; *State v. Henderson*, 160 Mo. 190; *McAloon v. Pawtucket*, 22 R. I. 191.

Even though the relator shows that he has no other adequate remedy, the court may still exercise its discretion in granting or refusing the writ. *People v. Hill*, 53 N. Y. 547.

See especially the learned note on the subject of discretion in granting the writ in 12 Am. Dec. 530. Also, *Independent Pub. Co. v. American Press Asso.*, 102 Ala. 475.

PEOPLE EX REL. CITIZENS' GAS LIGHT COMPANY OF BROOKLYN v. THE BOARD OF ASSESSORS OF THE CITY OF BROOKLYN.

1868. COURT OF APPEALS OF NEW YORK. 39 N. Y. 81.

(APPEAL from an order of the supreme court quashing a writ of *certiorari* directed to respondents to review a tax alleged to have been erroneously and illegally levied against the relator.)

(So much of the opinion as relates to the legality of the scheme and method of taxing corporations, is omitted.)

MASON, J.— * * * The only remaining question is whether the supreme court, in virtue of its supervisory power over inferior tribunals by means of the common law writ of *certiorari*, had jurisdiction, and ought in plain and clear duty under the law to have corrected this error of these assessors.

It is claimed and insisted by the defendant, that how far and in what cases the supreme court will exercise this power of review are questions addressed to the sound discretion of that court, and as that court have quashed the writ in this case their discretion cannot be reviewed in the court. I cannot assent to this proposition when applied to a case like the present. The office of this writ of *certiorari*, when issued out of the supreme court to review the

proceedings and determination of inferior tribunals, has fixed limits that may be regarded as settled by the adjudged cases in this state, although it must be conceded that there is a great conflict in the decisions when we get beyond a certain point in the functions of this writ. I think we may safely say that the following rule may be deduced from adjudged cases in this state, viz.: That its office extends, unquestionably, to the review of all questions of jurisdiction, power and authority of the inferior tribunal to do the acts complained of, and all questions of regularity in the proceedings, that is, all questions whether the inferior tribunal has kept within the boundaries prescribed for it by the express terms of the statute law or by well settled principles of common law. The following cases are referred to as fully sustaining these propositions: 20 Johns. 80; 6 Wend. 566; 10 *id.* 421; 15 *id.* 452; 8 Cow. 13, 16; 7 *id.* 108, 136, 137; 17 Wend. 464; 20 *id.* 103; 2 Hill, 9, 11; *id.* 398; 6 How. 25; 6 Cow. 570; 2 Wend. 395; 5 *id.* 98; 32 Barb. 131; 43 *id.* 232; 3 Seld. 152; 3 Kern. 223; 23 N. Y. 192, 222; 26 *id.* 163.

I cannot assent to the proposition, that when the supreme court have issued the writ, heard the case upon the return, and have committed a plain error in law, and have come to the conclusion, erroneously, as in this case, that the assessors have kept within the boundaries prescribed by the statutes; and, therefore, hold that the relators can take nothing by the writ, and give judgment quashing the writ; that such judgment is not subject to review in this court. The judgment of the supreme court, in such a case, is not rendered upon the ground, that the proceedings ought not to be reviewed by the writ, or that it was improvidently issued, but upon the ground that the allegations of error have not been sustained in the given case. Since the decision of the several suits growing out of the tax assessments in the city of Poughkeepsie, there is no redress to the citizen against illegal assessments like this, if it is not afforded upon this common law writ of *certiorari*, which it certainly can be, so far as to require the assessors to keep within the rules of law, and comply with terms prescribed by statute. The judgment of the supreme court must be reversed, and judgment given for the relators, directing and requiring that the sum of \$291,128.26 be stricken out of the capital stock in said assessment, leaving the assessment to stand as thus corrected.

Judgment reversed.

See also *People v. Board of Assessors*, 39 N. Y. 81; *People v. Commissioners*, 103 N. Y. 370; *Farmington &c. Co. v. County Com'rs*, 112 Mass. 206, loc. cit. 224; *Harris v. Barber*, 129 U. S. 366.

6. Effect of acquiescence, laches, or delay of the relator.

BOARD OF SUPERVISORS v. MAGOON.

1884. SUPREME COURT OF ILLINOIS. 109 Ill. 142.

MR. JUSTICE WALKER delivered the opinion of the court.

Appellee sued out a common law writ of *certiorari*, to bring before the court the record of the proceedings of the road commissioners of Scoles Mound township, in Jo Daviess County, and of three supervisors, refusing to alter a road in that township. On the application and petition for its alteration, the road commissioners refused to grant the prayer of the petition, and the case was appealed to three supervisors, who, after hearing the evidence for and against, on a protracted trial, lasting a number of days, affirmed the decision of the road commissioners, and to vacate and quash these proceedings appellee sued out this writ. On a hearing in the circuit court the proceeding was quashed. From that judgment an appeal was prosecuted to the appellate court of the Second district, which affirmed the judgment of the circuit court, and the case is brought to this court by appeal.

The scope of this writ is quite limited at common law. Its operation was enlarged, or the practice regulated, by acts of parliament never in force in this state. It was used principally in criminal cases, to remove them from inferior tribunals to the court of king's bench for trial. The writ went, as a matter of course, on the application of the crown; but when made by defendant, he was required to show cause. It, as to the defendant, or a private person or a private right, was not a writ of right. (*Trustees of Schools v. School Directors*, 88 Ill. 100.) Cause must be shown by the petition, or it will not be granted, or if it is granted, it must be quashed. It was also used to bring before the court of king's bench the record of commissioners of the poor, and other rates, and in cases where an individual was sued in a court having no jurisdiction, and no appeal or writ of error was given by law, or the jurisdiction had been exceeded, or it appeared that the proceeding was against law. The proceedings on the return of the record were confined solely to the record of the lower court of tribunal, unless it were in criminal cases removed to the king's bench, for trial; as other criminal cases instituted, to be tried at *nisi prius*. The purpose of the writ, was in all cases, to prevent injustice. Except in criminal cases it was only allowed where there was no appeal or writ of error, and where there was a wrong or injury that could not be otherwise corrected. It was used to prevent irreparable wrong or injury. Unless the writ was asked in a case

involving a private matter, it was required to be sought by the attorney for the crown, or the prosecutor. In matters in which the rights of the public were concerned, the writ was alone prosecuted by the representative of the public. But whether it shall, or not, be granted, is largely a matter of discretion. The doctrine so announced in *Hyslop v. Finch*, 99 Ill. 171, and the same doctrine was recognized in *Trustees of Schools v. School Directors*, 88 Ill. 100, and they announce that this discretion is not an arbitrary exercise of judicial power, but is one that is subject to review. If the discretion has been improvidently exercised in issuing the writ, the error will be corrected on appeal.

If not the prime mover in this proceeding, appellee was one of its promoters. He signed the petition and seems to have been active in pressing its allowance, and, he, at every step in the proceeding which was to alter a road running over his land, as we understand the record, pressed the petition precisely as though every step was regular and in exact conformity, in every particular, with the requirements of the statute. He was pressing the petition, and if there was any material requirement omitted, he must then have known it, and should have had it corrected before proceeding further. He had no right to trifle with the process of the law, to speculate on the chances of a favorable result, and when it proved adverse, then to turn and claim what he did was illegal and void. To permit him so to act would render such proceedings vexatious and expensive to no beneficial purpose. Although a person who took no part in the proceeding, or a person opposing a proceeding of this character, might question the correctness of every material step taken, we think the appellee is precluded from saying that what he did was not legal, after having urged all of his acts, or from saying those he caused to be performed are illegal and void. He assisted in the inauguration of the proceeding, and acted upon what he and others did as though in conformity to law, and he must be bound by such acts.

As to the objection that the highway commissioners are not shown by the record to have posted the notices required, of the time set for hearing, the record of the town clerk recites that the notice was given, and names the places where they were posted. By appearing and proceeding to a hearing appellee admitted there was notice, and he is estopped to afterwards deny it. Whether or not there was proper notice, he waived that by appearing and proceeding with his application. He had sufficient notice to enable him to appear and be heard, and he was not injured for want of notice. Whether others not appearing and participating in the proceeding are estopped, is a question not before us for decision. The commissioners recite, in the order entered at the hearing, that they met at the time and place mentioned in the notice, and that

is evidence that notice was given. (See *Wells v. Hicks*, 27 Ill. 345; *Frizell v. Rogers*, 82 *id.* 109.) We are clearly of opinion the record shows that the highway commissioners had jurisdiction.

It is urged that the notice was not given of the time and place of hearing the appeal, as required by the statute. It is a sufficient answer to this objection to say that appellee appeared at the time, and moved for and obtained a continuance of the time for hearing the appeal, and on the day to which it was continued he and the other parties appeared, and the hearing was entered upon and continued until the final result was reached. He is thereby estopped from urging there was not a sufficient notice given of the appeal. *Anderson v. Wood*, 80 Ill. 16, is decisive of this question.

It is urged that the record fails to show that proclamation was made or notice given of the continuance of the hearing from the 13th to the 29th of March. We fail to find any such requirement of the statute. All parties having an interest in the matter are presumed to be present, and to take notice of the adjournments of the supervisors. Appellee had notice, and appeared on the 29th, and has no right to complain. He was deprived of no right.

It is urged that the supervisors did not announce their decision whether they would grant or refuse the prayer of the petition, within twenty days of their first meeting. Appellee himself, at the first meeting, procured a continuance for sixteen days, and he was heard by counsel and witnesses which occupied the time of the supervisors, and as he produced the delay by procuring a continuance of his own case, he surely should not be heard to complain. The only limitation on the time when the appeal shall be heard, seems, by the 99th section of chapter 121, to be, that the person appealing shall give notice of the appeal, to the highway commissioners, and to at least three of the petitioners, and also to the same parties a notice where and when such appeal will be tried, at least three days before such trial, within ten days after such decision has been filed in the office of the proper clerk. The 100th section provides that the supervisors shall fix upon a time and place when such appeal shall be heard by them. The 99th section requires that notice of such time and place shall be given within ten days after the decision of the highway commissioners shall be filed with the town clerk. That section also provides that upon such appeal the supervisors shall have the same power and authority as is conferred on the commissioners of highways, not only in regard to the laying out, altering, widening or vacating any road, but shall have the same power to cause a jury to be summoned to assess damages, etc. It will be observed that while this section confers the same power, it does not limit its exercise to the manner prescribed in previous sections as to its exercise by the highway commissioners. But there is no provision relating to the

action of the supervisors, in trying the appeal, prescribing the time in which the decision shall be reached and announced. In that regard there is no limitation as to the time when the decision shall be made and announced. The 101st section simply provides that they shall make a report of their proceedings and decision in like manner as is required of the commissioners. The 72d and 73d sections provide for the manner in which the commissioners shall proceed to try the petition. The latter of these sections requires the commissioners to indorse on or annex to the petition a brief memorandum of their decision, which shall be signed by the commissioners, and filed in the office of the town clerk, so indorsed or annexed, within ten days after it shall be made. The report of the supervisors complied strictly with this requirement, and it must be held sufficient.

A careful consideration of the record satisfies us that there is no error of which appellee can complain. The circuit court should have quashed the writ and dismissed the proceeding. The appellate court erred in affirming the judgment of the circuit court, and the judgment of the appellate court is reversed and the cause remanded.

Judgment reversed.

WHITEHEAD v. GRAY ET AL.

1830. SUPREME COURT OF NEW JERSEY. 12 N. J. L. 36.

OPINION of Chief Justice:

Controversies having arisen between Thomas J. Whitehead, on the one part, and Geo. W. Gray, and Samuel H. Gedney, of the other part, they agreed, by an instrument of writing, to submit "all matters in difference between them," to the arbitrament of three persons mutually selected. The arbitrators made an award. Whitehead being dissatisfied, sued out a writ of *certiorari* directed to them, requiring them to certify to this court, the "submission and award, and all things touching and concerning the same." The arbitrators have made return and send, "the submission and one of the awards, the other award (both being alike), having been delivered to Geo. W. Gray and Samuel H. Gedney, before receiving the writ." The exceptions to the award, as stated by the plaintiff in *certiorari*, in the reasons filed, are, that the arbitrators did not act, although requested, on certain matters contained within the submission; and that they did act on matters, not within the submission, and beyond their powers.

The case is submitted to us on the return to the *certiorari* and depositions since taken, and a written argument of the plaintiff's counsel, no counsel having appeared on the other part.

The question which presents itself for examination, is, whether this court has jurisdiction to issue such a writ, and thus to inquire into the proceedings of the arbitrators? Whether a *certiorari* directed to arbitrators who have made and published their award for the purpose of impeaching and setting aside the award, can on legal principles be maintained? The allocatur was signed by the judge, of whom it was asked, with hesitation, from a desire, however, not to deprive the complainant of the remedy, if lawful, and under an expectation, the propriety of it would be examined here before the whole court, where it might be more satisfactorily decided.

There is no precedent of such a *certiorari*, in this court; in the other states of the union; or in the English reports, so far as I am able to learn, either from my own researches or from the brief of the plaintiff's counsel. Hence a very cogent and almost irresistible argument results against the present employment of this writ. So frequent here and elsewhere are arbitrations; so numerous are awards; so invariably is the losing party dissatisfied, so frequently are the very complaints made which are here urged; so usual is it for the unsuccessful litigant to suppose, and oftentimes most sincerely, that the arbitrators have done too little for him and too much against him; and the common modes of redress against awards are deemed so arduous and straitened, that we may presume, if not conclude, the omission to use the writ of *certiorari*, is from the conviction of the profession, that it cannot lawfully be done. In the *King v. Whitbread*, Doug. 549, Lord Mansfield said: "Though great industry has been employed, no case has been produced, in which a *certiorari* has been granted to remove proceedings before the commissioners of excise. This circumstance alone affords strong ground to suspect that none is grantable." Industry equally great and commendable has been used here by the plaintiff's counsel, and with a like unsuccessful result. I am not willing, however, on this argument alone, to deny the writ, but choose to seek otherwise to ascertain the bounds of our jurisdiction.

One ground relied upon by the plaintiff in support of the writ is, that as the submission contains no agreement for making it a rule of the court, and as there is no allegation of corrupt conduct of the arbitrators, he has no other remedy in a court of equity or in a court of law. "The only remedy he can adopt, so as to embrace all of the objections to the award," he says, "is by *certiorari*."

It is true, as the submission may not, for want of an agreement of the parties, be made a rule of court, the complainant cannot seek redress in the same mode as if there had been such an agreement. And if he cannot, let it be remembered he has voluntarily deprived

himself of it. Such a clause is very commonly inserted; and he was wholly at liberty to accede to or refuse an arbitration under this or any other form. This mode of adjusting differences is never by compulsion or *in invitum*. If the award remains unperformed by Whitehead, Gray and Gedney must resort to an action on the submission or the award. In such action, Whitehead may avail himself of certain exceptions against the award, and for others, the court of equity opens its doors to him. By way of defense in such action or by bill in chancery, he may urge against the award all such objections as can, on legal principles, be sustained. Whether he can, in either place, enforce the complaints, he here makes, we need not determine. If he may, he has other remedy and is not permitted to invoke the extraordinary jurisdiction of this court by *certiorari*. If he may not, the law has not provided him redress upon such grounds or does not consider them sufficient as to impeach an award; a mode of adjusting controversies to which it compels no one to resort, and upon which before any one enters, he should weigh the maxim, *Qui sentit, commodum sentire debet et onus*.

The jurisdiction of this court, by means of the writ of *certiorari*, is, in my opinion, correctly and perspicuously laid down in *Ludlow v. Executors of Ludlow*, 1 South. 389. "It has the superintendence of all inferior courts both civil and criminal; of all corporations in the exercise of their corporate powers; and of all public commissioners in the execution of their special authorities and public trusts. It causes their proceedings to be certified before it, in order that, upon inspection, they may be stayed, affirmed or set aside, as the case may require; and that in many cases before, as well as after judgment."

The counsel of the plaintiff seeks to give, as it seems to me, an undue extension, unintended by the court, to a subsequent clause of the opinion above referred to, page 392, when he states in his brief that the *certiorari* is thereby said to lie to "all tribunals which are called extraordinary and special, in contradistinction to the ordinary and common courts." The context fully shows that the court here meant no wider range than had been previously expressed. They speak of the use of the writ, "in superintending inferior jurisdictions in the exercise of public powers and authorities, in which the people at large are concerned." They specify them. "Of this kind of jurisdiction are all tribunals established by law, for the execution of particular public trusts, such as boards of freeholders," "commissioners appointed to lay out roads and others," and then add, "in short, all tribunals which are called extraordinary and special, in contradistinction to the ordinary and common courts established for the trial of criminal offenses, and the determination of private right between citizen and citizen." The next sen-

tence also clearly evinces their meaning. "The staying or superseding the proceedings of these public functionaries in the execution of their trusts."

Let us now examine the authorities, on the head of jurisdiction to which we are referred by the plaintiff's brief. They consist of general rules and particular instances of the exercise of the writ. Thus we are referred to Bac. Abr. Cert. B. 351, where the author says "the writ lies to remove the proceedings from an inferior court, whether of an ancient or newly created jurisdiction, unless exempted by statute or charter." But arbitrators were not here intended nor can they by any just construction be included. The same may be said of the doctrine laid down in another place. "It is a consequence of all inferior jurisdictions erected by parliament to have their proceedings returnable into K. B." Arbitrators are not what is here meant by inferior jurisdictions. In *Rex v. Inhabitants of Glamorgan*, 1 Ld. Raym. 580, the court recognized a distinction between an authority and a jurisdiction; for it being objected that this writ would not lie to remove orders made by commissioners of bankrupts, the court said they had only an authority, and not a jurisdiction. The citation made from 1 Lilley Abr. 253, is one of those general remarks which can only be understood by its specifications, and can only be true with its proper qualifications. If broadly, the writ, "lies in all cases where the superior tribunal can administer the same justice as the court below, and when the inferior jurisdictions do not proceed therein according to the rules of law," it is manifest this court may be compelled to assume most of the judicial business of the state. Can we not administer in all civil actions, in point of jurisdiction at least, the same justice as the courts of common pleas?

The plaintiff's counsel has cited *Cases Temp. Hardwicke* 261, to show that when an act of parliament directs something to be done, the court will enforce it by mandamus; and 3 Smith 388, E. T. 1806, that arbitrators are subject to an order of K. B. in England, under a mandamus, for not coming to an agreement. And he argues that if incorrectly done, the court will correct the matter by *certiorari* in all cases where by mandamus they would order it to be done. This deduction is not sound. In *Rex v. Clapham*, 1 Wills. 305, a mandamus was issued to the old overseers of the poor to deliver the books of the poor's rates, to the new overseers. In 3 Burr. 1264, to the trustees of a dissenting meeting house to admit a person duly elected, to the use of the pulpit. If the books had been improperly delivered in the one case, or the pulpit improperly opened in the other, no *certiorari* would have been granted. In *Marbury v. Madison*, 1 Cranch 170, the Supreme Court of the United States thought a mandamus to the secretary of state to deliver a commission or a copy of it

from the record, was a proper remedy, although being an exercise of original jurisdiction not warranted by the constitution, they did not issue it. But if the commission had been improperly delivered, by the secretary, can it be supposed they would have deemed a *certiorari* an apt remedy to correct such error?

We are also referred to particular cases for the exercise of the writ of *certiorari*. *Groenvelt v. Burwell*, 1 Salk. 144. The writ was to the censor of the College of Physicians to whom a power was given by charter, to examine and punish in cases of malpractice and who had condemned *Groenvelt* to fine and imprisonment. In 3 Mod. 94, 95, (*Rex v. Plowright*) it was held a *certiorari* would lie to remove an order of two justices to set aside a distress by the collector of the tax on chimneys, made under an act of parliament, giving to one or more justices authority to hear and determine in case of dispute. Cro. Jac. 484, *Carew's case* and Poph. 144, were applications for *certioraries* to remove indictments from Wales. In 1 Keble 818, *Bucknel's case*, a *certiorari* was applied for to remove informations for offences and to enforce penalties, exhibited before commissioners of excise; moreover it was not granted. In 2 Keble 43, a *certiorari* was issued to remove the proceedings of the commissioners of fens. What they were, or what was the objection to them, is not stated. But in the same book, 82, *Bell v. Partridge*, the court denied a *certiorari* to the commissioners under the act for draining the Bedford Level, and said it was like the commissioners of bankrupts, in which case, if they decree contrary to law, the party has his remedy by action. 2 Keble 129, was a *certiorari* to the commissioners of sewers, who had very extensive powers to erect public works and make assessments for their expenses; and the object, in this instance, was, to remove an order they had made, charging one day alone for the repair of a sea wall.

It may have been seen, that all these instances of the allowance of the writ, are strictly within the rule laid down by this court; nor does any one bear even a remote analogy to the case now before us.

The rule in *Ludlow v. Executors of Ludlow*, is substantially the same as that stated by the Supreme Court of New York, in *Lawton v. Commissioners of Cambridge*, 2 Caines 179; and subsequently recognized in *Lynde v. Noble*, 20 John. 82, and *Le Roy v. Mayor*, etc., of New York, 20 John. 438. "The King's Bench in England (and this court is clothed with the same common law authority), has jurisdiction and may award a *certiorari* not only to inferior courts, but to persons invested by the legislature with power to decide on the property, or the rights of the citizen even in cases where they are authorized by statute, finally to hear and determine." Arbitrators are not meant by "persons invested by the

legislature with power to decide." Nor do the differences pointed out to us between arbitrators here and in England, growing out of our statute, which requires them to be sworn or affirmed, and authorizes them to administer oaths or affirmations to witnesses, render them any more a tribunal, or jurisdiction, or inferior court, within the scope of a writ of *certiorari*, than arbitrators in England. Some provisions designed to render this mode of adjusting disputes more safe, efficient and practically useful, are peculiar to our statute, but the leading principles of arbitration remain unchanged.

An argument of some weight against awarding this writ to arbitrators, is, that they are not bound to make or keep any record or minute of their proceedings; their award when made, is usually delivered to one or both of the parties; their functions are then executed and at an end. How is a return to the writ to be effected? Is the use of the writ to depend on the chance that the arbitrators may not have parted with the award? Is not the propriety of the writ justly questionable, when those to whom it is to be directed, at all times may be able to say, and in general must say, they have nothing remaining before them?

The writ of *certiorari* was, in this case, in my opinion, improvidently issued, and ought to be quashed.

See also *State v. Judge*, 33 La. Ann. 15; *Wallace v. Jameson*, 179 Pa. St. 94; *Lantis, In re*, 9 Mich. 324; *Hatter v. Eastland*, 22 Ala. 688; *Hagar v. Board &c.*, 47 Cal. 222; *Illingworth v. Rich*, 58 N. J. L. 507; *Rober-son v. Bayonne*, 58 N. J. L. 325.

PEOPLE EX REL. WALDMAN v. BOARD OF POLICE
COMMISSIONERS ET AL.

1880. COURT OF APPEALS OF NEW YORK. 82 N. Y. 506.

APPEAL from order of the general term of the supreme court, in the first judicial department, affirming an order of special term, which quashed a writ of *certiorari* on hearing upon a return to the writ.

The writ was obtained to review the proceedings of the board of police commissioners of the city of New York, removing the relator from the position of clerk in the police department.

The relator was removed April 1, 1876; he applied for the writ March 1, 1878.

DANFORTH, J.—The order made by the special term was that the writ be quashed, and it was intimated upon the argument that under the practice of this court in such cases the appeal must be

dismissed, but at request of the appellant's counsel the case was held, to enable him to hand up points and authorities to the contrary. We are still of the opinion that this trouble might have been spared. It had been frequently decided that the supreme court has a discretionary power to grant or withhold a common law *certiorari*. (*In re* Mt. Morris Square, 2 Hill 28; *People ex rel. Vanderbilt v. Stilwell*, 19 N. Y. 531; *People ex rel. Davis v. Hill*, 53 *id.* 547; *People ex rel. Hudson v. Board of Fire Commissioners*, 77 *id.* 605.) In these (and many other cases to the same effect might be cited), it was held that unreasonable delay in applying for the writ might be a ground for refusing it, and for quashing it even after a hearing on a return thereto. We cannot distinguish this case from those cited.

The relator was removed from office April 1, 1876. The writ of *certiorari* was applied for March 1, 1878. This delay might be considered unreasonable, and as amounting to acquiescence in the action of the department. Such a question was not presented in *The People ex rel. The Citizen's Gas Co. v. The Board of Assessors*, (39 N. Y. 81); the facts in that case are palpably unlike those now before us, and the learned judge who there delivered the opinion seems to have regarded it as an exception to the rule. In *Stilwell's* case, (19 N. Y. 531), a distinction is suggested upon which an appeal might lie, but it does not avail the appellant, for in the case before us the supreme court neither annulled nor affirmed the proceedings complained of; nor does the language of the new code, to which we are referred (§ 190, subs. 2 & 3) differ in meaning from that of the old (§ 11) which was in force when the cases above referred to were decided.

We think the appeal should be dismissed.

All concur.

Appeal dismissed.

See also *Keys v. Board &c.*, 42 Cal. 253; *Trustees &c. v. School Directors*, 10 Chicago Leg. News 380; *Dye v. Noel*, 85 Ill. 290; *People v. City of Brooklyn*, 8 Hun (N. Y.) 56; *Lantis, In re*, 9 Mich. 324; *State v. Milwaukee Co.*, 58 Wis. 4; *Long v. Ohio River R. Co.* 35 W. Va. 333; *People v. Hill*, 53 N. Y. 547; *State v. Jersey City*, 35 N. J. L. 381; *Tucker, Petition of*, 27 N. H. 405, 410; *Stedman v. Bradford*, 3 Phila. (Pa.) 258.

Where, however, the order of the court below is wholly in excess of its jurisdiction, the delay of the relator in applying for *certiorari* affords no reason for allowing such order to stand and refusing the writ. *Boston & R. Co. v. County Com'rs*, 116 Mass. 73. See also *Graver v. Fehr*, 89 Pa. St. 460; *Overseers v. Overseers*, 26 N. J. L. 210.

What shall constitute a "reasonable time" within which relator must apply for the writ or be barred by his laches, is a question for the judicial discretion of the court and will be governed almost wholly by the facts of the individual case. *People v. Perry*, 16 Hun (N. Y.) 461; *State v. City of Paterson*, 39 N. J. L. 489, 493.

7. As an auxiliary remedy.

FRANKLIN ACADEMY v. HALL, ETC.

1855. COURT OF APPEALS OF KENTUCKY. 16 B. Mon. 472.

(SO MUCH of the opinion as relates to the legality of possession under the various land patents involved in the case is omitted.)

MARSHALL, C. J.— * * * The defendant, John Garrett, exhibited a patent to himself, dated in 1839, for two hundred and fifty acres, lying wholly within the boundary of the elder patent as claimed, and proved that he had been in possession, and lived within the boundaries of his patent for (as the copy of the bill of exceptions in the transcript states) two years past—that is preceding the trial, which was on the 29th day of April, 1851. But two years last past would not reach back to the time when the notice in this action was served on Garrett. If the proof as to Garrett's possession be truly stated in the transcript, he had no pretext for claiming protection on the ground of length of possession; but the court gave an instruction with reference to the case, which authorized the jury to find for him on the ground of actual settlement and residence within his patent for more than seven years before the commencement of the action. This, upon the proof as stated in the record, would have been so palpably without foundation or authority in the evidence, that looking to the date of Garrett's patent, more than eleven years before the trial, and considering the fact that a possession of two years before the trial would not include the commencement of the suit, and could not have constituted even a supposed bar to the action, we think there is, in all probability, a mistake in copying the bill of exceptions, into the transcript, and as we know that the words *ten* and *two* are often so written that it is difficult to determine which was intended, we may conjecture that the proof was that Garrett had been living there within his patent for ten instead of two years, and that it was so stated, or intended to be so stated, in the original bill of exceptions. If this be so the instruction had a sufficient basis in the evidence with respect to Garrett's case as well as the others, and as there would have been no error in giving or refusing the instructions, the judgment would be affirmed; but as we cannot, upon this conjecture, however probable, affirm a judgment which, as the record stands, is obviously and substantially erroneous, we suspend the determination of the case in this court until the return of a *certiorari*, which, as the affirmance of the judgment depends upon it, the court orders, *ex mero motu*, for the purpose of ascertaining with more certainty than at present, the true state of the evidence with regard to Garrett's possession within his patent.

Wherefore it is ordered that a *certiorari* be issued from this court to the clerk of Caldwell county, requiring him to certify a true copy of that part of the bill of exceptions in this case which follows immediately after the statement of the reading of Garrett's patent, and states the proof made by him, beginning with the words "and proved he had been in possession" and closing with the words "years last past."

Afterwards it appearing upon the return of the *certiorari* that the bill of exceptions states that the defendant, John Garrett, proved, "that he had been in possession, and lived within the boundaries of his patent ten years last past," therefore the judgment is affirmed.

BECK, BY HIS NEXT FRIEND V. DOWELL, EXECUTOR.

1892. SUPREME COURT OF MISSOURI. III Mo. 506.

GANTT, P. J.—This cause was appealed from the circuit court of Lewis County to the St. Louis Court of Appeals. That court in an opinion by Judge Rombauer affirmed the judgment of the circuit court; but Judge Biggs being of the opinion that the conclusion reached by the majority, that evidence of the financial condition of the plaintiff in an action when the evidence will justify the jury in awarding exemplary or punitive damages was admissible, is in conflict with and opposed to two decisions of this court: Overholt v. Vieths, 93 Mo. 422, and Stephens v. Railroad, 96 Mo. 207, the cause was, under the constitution, certified to this court.

I. When the cause was heard in the court of appeals, the instructions were not in the record. No efforts were made to supply them in that court, and that court rightly proceeded on the assumption that the trial court had correctly declared the law to the jury. Since the case has reached this court a certified copy of the instructions has been filed with the record. The propriety of considering these declarations of law by this court, under these circumstances, suggests itself at once.

While this court obtains jurisdiction to "rehear and determine a cause so certified to us by either of the appellate courts, as in cases of jurisdiction obtained by ordinary appellate process," there is nothing in the constitution that justifies parties in assuming that we will or can take cognizance of matters not in the record.

When a record is deficient in any material respect, the practice is uniform that, the party desiring the absent record should suggest the diminution and apply for a writ of *certiorari*, or file stipulations

in this court, supplying the record. In this case, nothing of the kind has been done, but from the brief of the appellant, we take it, he assumes that these instructions are properly before us.

There is no hardship in requiring parties to govern themselves by the rules of procedure established for the disposition of causes. For the purposes of this appeal, these instructions are no part of the record, and the cause will be determined on the presumption that the trial court correctly instructed the jury. Parties must pursue legal methods in perfecting their transcripts, and in the proper courts, and in proper seasons. * * *

(So much of the opinion as relates to the admission of evidence of the pecuniary condition of plaintiff in an action for damages for personal injuries, is omitted.)

WORLEY v. SHONG.

1892. SUPREME COURT OF NEBRASKA. 35 Neb. 311; 53 N. W. 72.

POST, J.—The plaintiff in error sued the defendant in error before a justice of the peace of Box Butte County. The case was tried to a jury, resulting in a verdict for the plaintiff. From the transcript of the justice, it appeared that the verdict was returned and filed at eight o'clock and twenty-five minutes P. M. Feb. 4, 1890, but that judgment was not entered thereon until the next day. Defendant in error filed a petition in error in the district court of said county by which he sought to reverse said judgment, on the ground that it was not entered immediately upon the returning of the verdict, as provided by section 1002 of the code. In the district court he filed an affidavit to the effect that the justice did in fact enter judgment on the same day, the verdict was returned, and immediately thereafter, and so entered it on his docket, but had subsequently altered the entry so as to show that it was not entered until the following day. Upon this showing he suggested a diminution of the record, and moved for an order requiring the justice to certify accordingly. This motion was overruled, to which exception was taken. The district court did not err in overruling the motion aforesaid. In all appellate proceedings the record of the trial court, when properly prepared and verified, imports absolute verity. Elliott App. Proc. 186. It is one thing to amend the transcript, and quite a different thing to change the record. *Id.* 190. The rule is well settled, both in appeals and proceedings in error, that this suggestion will be entertained and the rule allowed only when it is made to appear that there is an additional record in the trial court; in short, that some part of the record has been omitted. For the purpose of the

petition in error the district court rightly held that the transcript of the justice, duly certified, could not be impeached. The district court, having refused to allow an order for the correction of the record by the justice of the peace, entered judgment reversing the judgment for plaintiff. The court evidently followed *Thompson v. Church*, 13 Neb. 287, 13 N. W. 626, and *Austin v. Brock*, 16 Neb. 642, 21 N. W. 437, in holding that the judgment was not entered "immediately" upon the finding and return of the verdict, within the meaning of section 1002 of the Code. The case is clearly within the rule announced in the above cases. It may be that a more liberal construction would have been in harmony with the spirit of the code, but, having been the recognized rule in this court for so many years, it will be adhered to until changed by the legislature. We are of the opinion that the justice of the peace had lost jurisdiction at the time the entry of judgment was made. The judgment of the district court is right, and should be affirmed. The other judges concur.

See also *Hipp v. Martin*, 3 Tex. 18; *Weider v. Overton*, 47 Iowa 538; *Hall v. Durham*, 113 Ind. 327; *Charbonnet v. Dupassaur*, 27 La. Ann. 105; *Sowle v. Cosner*, 56 Ind. 276; *Bryson v. Johnson Co.*, 100 Mo. 76; *Sharon v. Sharon*, 79 Cal. 633; *Toledo & C. R. Co. v. Town of Chenoa*, 43 Ill. 209.

The granting of the writ as an auxiliary remedy is also discretionary with the court and the application therefor should be supported by evidence. *State v. Orrick*, 106 Mo. 111.

Where the amendment to the record is of matters obviously immaterial or ineffectual to alter the decision of the cause, the writ will be refused. *Reed v. Curry*, 40 Ill. 73; *Willis v. Chambers*, 8 Tex. 150.

Promptness on the part of relator is as much required here as where the writ is used as an original remedy.

Section 2.—Jurisdiction to Issue the Writ.

- I. Courts possessing supervisory powers and general jurisdiction.

DRAINAGE COMMISSIONERS v. GRIFFIN ET. AL.

1890. SUPREME COURT OF ILLINOIS. 134 Ill. 330; *supra* p. 550.

THE CASE OF CARDIFFE BRIDGE

1701. COURT OF KING'S BENCH. 1 Salkeld 146.

CERTAIN orders of justices made pursuant to a private act of parliament for repairing Cardiffe Bridge, were removed hither by *certiorari*; and one objection was made, That this court could not send a *certiorari* to the justices of the peace in Wales; because it might be sent by the court of Grand Sessions, which was as the King's Bench, and which by this means was skipped over and rendered useless. *Sed non allocatur*: It is the constant practice to send them into the counties palatine, and yet they have original jurisdiction, and the same courts within themselves. The counsel for the Welsh jurisdiction said, this differed, because the jurisdiction of counties palatine was—derived from the crown. But this was not regarded. And the chief justice said that, in case of sewers, this court inquires into the nature of the fact before they grant a *certiorari*, that no mischief may happen by inundations in the meantime; but this is only a discretionary execution of their authority, *for wherever any new jurisdiction is erected, be it by private or public act of parliament, they are subject to the inspections of this court by writ of error, or by certiorari and mandamus.*

GROENWELT v. BURWELL.

1701. COURT OF KING'S BENCH. 1 Salkeld, 144.

THE censors of the college of physicians have power by their charter, confirmed by act of parliament, to fine and imprison for malpractice in physic; and accordingly they condemned Dr. Groenwelt, for administering *insalubres pillulas noxia medicamenta*, and fined and imprisoned him; And the question being, whether error or *certiorari* lay? It was held per Holt, Chief Justice.

1st. That error would not lie upon the judgment, because their proceeding is not according to the course of the common law, but without indictment or formal judgment: Yet,

2dly, That *certiorari* lies; for no court can be intended exempt from the superintendency of the king in this court of B. R. It is a consequence of every inferior jurisdiction of record, that their proceedings be removable into this court, to inspect the record, and see whether they keep themselves within the limits of their jurisdiction. *Vide* 3 Cro. 489. By the 23d H. 8, c. 5, the commissioners of sewers are to certify their proceeding into chancery; and the 13 Elizabeth c. 9, says the commissioners shall not be compelled to make any certificate: Upon this, by mistake, they thought themselves not accountable on a *certiorari*, and refused to obey a *certiorari* issued out of the king's bench; and for this the whole body of the commissioners were laid by the heels.

COMMONWEALTH v. BALPH ET AL.

1886. SUPREME COURT OF PENNSYLVANIA. 111 Pa. St. 365; 3 Atl. 220.

PAXSON, J.—On March 1, 1884, the defendant below presented a petition to this court praying us to issue a writ of *certiorari* to the quarter sessions of Warren county to remove into this court the indictment and record of a certain case of *Com. v. R. A. Balph, Henry P. Ford, and others*. The defendants were indicted for conspiracy and assault, and the ground upon which the removal was asked was that the defendants could not have a fair trial in Warren county for certain reasons set forth in the said petition. Without entering into detail, it is sufficient to say that the case arose out of a conflict of jurisdiction between the court of Common Pleas of Warren county and the court of Common Pleas No. 2, of Allegheny county, in regard to the appointment of a receiver, culminating in the appointment of such officer by each court, and an attempt by each to enforce its own orders and decrees. So far did this proceed that the court of Warren county discharged upon *habeas corpus* a person adjudged guilty of contempt by the court of Allegheny county, and who was in custody under attachment. The petition further averred that a fair and impartial trial before a judge and jury of Warren county could not be had, because of the excitement and prejudice existing against them in said county, not only on the part of the public generally, but of the jurors likely to be impaneled in the case, and the judge before whom the cause would be tried.

For the purposes of this case we must assume the statements of the petition to be true. And even if the petitioners are mistaken in whole or in part in their allegations of prejudice, the fact that they have thus publicly challenged for cause the presiding judge would place the latter in a very unpleasant position were he called upon in the course of his official duty to try the cause. Upon this point we cannot do better than to quote the remarks of Lewis, J., in a similar application made to this court by one Derringer, in 1857. He says: "If it has been material to produce the statement of the judges, I see no reason why it should not be produced, as the time was ample. I see, therefore, no reason for continuing the cause. As the matters strike me, a statement of the judges in opposition to the affidavit would not be material. If what Mr. Derringer says in his affidavit be true, that two of them (the judges) expressed themselves in such a manner as to render a trial before them very unfair to the accused, it would be very improper for them to try this cause. If his statement against them be false, we may well suppose the feeling which that statement would make in the heart of those judges. We cannot control human nature, and where a judge has a man before him who has made a false charge against him it is almost impossible to administer justice fairly. I think it would be very unfair under these circumstances, to expect either of these judges to try this cause. They would be the last ones to whom to apply. Whether the affidavits be true or false, it seems to me a good reason for asking them not to decide."

Under all the circumstances, as developed by this petition, we think the judge of Warren county ought not to be called upon to sit in this cause. In saying this, we wish it distinctly understood that we in no way reflect upon him as a judge or a man; and we are of opinion that sufficient facts are averred as to render it extremely doubtful whether an impartial trial can be had before a Warren county jury, and that the cause is one which would justify us in removing it if we have the power.

This brings us at once to the vital question, whether such power still exists in this court. I say still exists, because no one doubts that this power was lodged in this court up to and until the adoption of the present constitution. It has been not only asserted but repeatedly exercised. Causes have been removed into this court, and tried by several of the judges who have preceded us. For over 150 years the right of a judge of this court to allow the writ of *certiorari* to remove an indictment before trial has been settled beyond controversy. The question as now presented is one of grave importance, and we have given it the most careful attention. It has been held under advisement for over a year, as it was of far more importance that the principle should be carefully and intelligently decided than that it should be done speedily. The delay of

one not very important case is of less consequence than the settling of an important principle, which is to be a rule of action for all time.

It is necessary to an intelligent discussion of the subject to review to some extent the past legislation of the state. I do so as concisely as is consistent with its proper understanding. * * *

(The court's review of the legislation on this subject, is omitted.) * * *

* * * Here endeth our legislation upon this subject. It will thus be seen that the right of this court, or a judge thereof, to issue the writ of *certiorari* is distinctly recognized by the constitution of 1790, and by three acts of assembly. There never was a time since the passage of the act of 1722 when this right was not to be found upon our statute books. It has existed practically unchallenged for over 150 years. If taken away at all, it is by the constitution of 1874. Before I discuss that question, I propose to consider the object and effect of the removal of a criminal case into this court, and the power of the court in the premises.

It will be observed that the act of 1722 expressly confers upon this court the powers of the king's bench in criminal cases. This is plain from the language of the act itself, and authority is scarcely needed for so plain a proposition. That there may be no doubt, however, upon this question, I will refer to the case of *Com. v. Simpson*, 2 Grant Cas. 438, where the act of 1722 was under consideration, and the construction I have indicated placed upon it by the court.

What are the powers of the king's bench as it existed in England when the act of 1722 was passed? We all know, in a general way, that it was the supreme court of oyer and terminer and general jail delivery; that when it sits in any county it outranks and supersedes any other criminal court there sitting. It was always ambulatory, and followed the king's person. In contemplation of law, the king sits there in person; at one time he sat therein in point of fact. Henry III sat in person with the justices *in banco regio* at the arraignment of Peter de Revallio. Speed 521. At another time the king sat there in person at the arraignment of Hubert, Earl of Kent. Speed 524, Coke, 71. But the king never took part in the trial; it was committed to his judges; yet the fact of his actual or supposed presence in the court gave to the latter great dignity and importance. In Sharswood's Blackstone, bk. 3, p. 42, the court of king's bench is thus described: "*The jurisdiction of this court is very high and transcendent. It keeps all inferior jurisdictions within the bounds of their authority and may either remove their proceedings to be determined here, or prohibit their progress below. It superintends all civil corporations in the kingdom. It commands magistrates and others to do what their duty requires, in every case where there is no other specific remedy. It protects the*

liberty of the subject by speedy and summary interposition. It takes cognizance both of criminal and civil cases,—the former in what is called the crown side or crown office, the latter in the plea side of the court." And in book 4 of the same work, at page 265, we find the following in regard to its powers on the crown side: "The court of king's bench, concerning the nature of which we partly inquired in the preceding book, was (we may remember) divided into a crown side and a plea side; and on the crown side or crown office it takes cognizance of all criminal causes, from high treason down to the most trivial misdemeanor or breach of the peace. Into this court also indictments from all inferior courts may be removed by writ of *certiorari*, and tried, either at bar or *nisi prius*, by jury of the county out of which the indictment is brought." "Also this court, by the plentitude of its power, may as well proceed on indictments removed by *certiorari* out of inferior courts as on those originally commenced here, whether the court below be determined or still *in esse*, and whether the proceedings be grounded on the common law or on a statute making a new law concerning an old offense." 2 Bac. Abr. 142, tit. "Court of King's Bench." "Also, it hath so sovereign a jurisdiction in all criminal matters that an act of parliament, appointing that all crimes of a certain denomination shall be tried before certain judges, doth not exclude jurisdiction of this court, without express negative words; and therefore it hath been resolved that 33 Hen. VIII, c. 12, which enacts that all treasons, etc., within the king's house, shall be determined before the lord steward of the king's house, etc., doth not restrain this court from proceeding against such offenses." *Id.*

To the same point are Viner's Abridgement and other English text books and decisions without number. The power of the king's bench is well and accurately defined, and is not a subject of dispute. It possesses the inherent power of removing by *certiorari* the records of any criminal case from the inferior courts at any stage of the proceedings. After a case has been so brought into the king's bench, it may be tried at bar or at *nisi prius* by a jury from the county from which the record was brought; or, if it is suggested upon the record, and proof by affidavit that an impartial trial cannot be had in such county, the record may be remanded to another county for trial. The latter is an important provision, as it amounts, practically, to a change of venue, and may take place in cases where no such change is given by statute. It requires, therefore, careful consideration. If I show that it exists in the king's bench, I show that it exists here, unless taken away by express words of the constitution or act of assembly.

In the case of *Rex v. Cowle*, 2 Burr. 834, that great criminal lawyer, Lord Mansfield, at that time chief justice of the king's bench, laid down the rule as follows: "But the law is clear and

uniform, as far back as it can be traced. * * * So, in parts of England itself, where an impartial trial cannot be had in the proper county it shall be tried in the next. As 5 Geo. I, Rex v. Inhabitants of the county of the city of Norwich, about the county bridge, the trial was in Suffolk. This is the ancient and general rule wherever the court has jurisdiction."

In Rex v. Harris, 3 Burr. 1330, the application to remove the record to an adjoining county for trial was refused upon the ground that the facts did not warrant it. All the judges, however, were of opinion that they had the power to order such removal. Such order was made in King v. Inhabitants of Nottingham, tried before Lord Chief Justice Hale, 2 Lev. 112. See Hale, P. C. 215, and note. The same rule was laid down in King v. The Inhabitants of the County of Cumberland, 6 Term R. 194, decided in 1795; and numerous other cases will be found cited in the opinion of the court.

This is the settled law of England, and in this country in those states in which the supreme court is clothed with the king's bench powers the same rule prevails. Thus in New York, in People v. Vermilyea, 7 Cow. 137, where an indictment had been removed by a *certiorari*, into the supreme court for trial, and the defendant moved for a change of the place of trial, it was said by Chief Justice Savage: "Changing the venue, speaking technically, is out of the question. The course in criminal prosecutions, where a clear case is made out, is to order a suggestion upon the record that a fair and impartial trial cannot be had in the county where the offense is laid. A *venire* is then awarded to the sheriff or another county, and the cause tried there, the indictment remaining unaltered as to the venue." Woodworth, J., concurred in the decision, and said: "There is no doubt of our power, upon a proper case, to send a criminal cause down for trial to a county other than that in which the venue is laid. * * * Hence, the venue, as such, cannot be changed. The place of trial must be altered by suggestion; and on clear proof that the cause cannot be tried in the county where the offense is laid, with safety to the rights of the defendant."

The same rule exists in Tennessee. In Kendrick v. State, Cook 475, it was held, citing the English cases, above referred to, that when it was made to appear to the supreme court, upon the removal of an indictment, that a fair trial cannot be had in the county where the venue is laid, the place of trial will be changed. And in Bob, a slave v. State, 2 Yerg. 176, it was held that, as the judges of that court were clothed with all the powers of the king's bench, they could issue a *certiorari* to the lower court to remove the record of a criminal case for trial; Peck, J., saying: "In England there is no question the *certiorari* would lie in such case, either before or

after judgment. Before judgment on a case made out that, because of the public clamor, justice could not, in all likelihood, be done the person charged in the county where charged." * * *

In New Jersey the same doctrine was held in *State v. Hunt*, 1 N. J. L. 287; *State v. Gibbons*, 4 N. J. L. 41; *Nicholls v. State*, 5 N. J. L. 539; and in Maryland, in *State v. Judges*, 3 Har. & McH. 115. * * *

From the foregoing I take it to be clear that up and prior to the adoption of the constitution of 1874, this court possessed the inherent power of issuing writs of *certiorari* to remove criminal cases; to try such cases at bar in any district where it might chance to be sitting, or to send it for trial at *nisi prius*; and upon sufficient cause shown to send it for trial to a county other than the one in which the indictment was found. And not only was such power inherent in the court, but the power to remove indictments has been from time to time expressly conferred by act of assembly. There never has been a period since the time the court was first organized that it did not exist, and the statutes conferring it have never been expressly repealed. Have they been repealed by implication? It would be a novel doctrine to hold that important powers which have been exercised by the highest judicial tribunal in the state for over 150 years, not only permissively but also by the express command of the statute, can be taken away by mere implication. The suggestion of such a principle carries with it its own refutation. But the law upon this subject is not uncertain. Just here it is well to bear in mind that the question of our power to issue the writ of *certiorari*, and our power over the case after removal of the record into this court, are separate questions. I will consider the latter branch of this case when I reach it. At present I am upon the question of the power to issue the writ.

The writ of *certiorari* is a writ of common right, to be taken away, not by implication, but only by express words (*Mauch Chunk v. Nescopeck*, 21 Pa. St. 46; *Rex v. Moreley*, 2 Burr. 1040; *Rex v. Jukes*, 8 Term R. 544;) and in *Overseers of the Poor v. Smith*, 2 Serg. & R. 363, it was held that the jurisdiction of the supreme court can be taken away only by express words or irresistible implication. We might multiply authorities indefinitely upon this point, were it necessary. It is sufficient to refer to the late case of *County of Allegheny v. Gibson*, 90 Pa. St. 397, where the subject of the effect of the new constitution upon existing laws is discussed at length. * * *

It is urged, however, that if the right to issue the writ technically exists, yet we have no power to try or control this case after it is brought here; and attention is called to the third section of article 5 of the constitution, as taking away our power in this respect. If, in point of fact, we have no power over a case after it is brought

here, it would be a persuasive argument against the power to bring it here, as we do not propose to do a vain thing, nor does the law contemplate that we should.

The portion of the constitution referred to is as follows:—"The jurisdiction of the supreme court shall extend over the state, and the judges thereof shall, by virtue of their offices, be justices of oyer and terminer and general jail delivery in the several counties; they shall have original jurisdiction in cases of injunction where a corporation is a party defendant, of *habeas corpus*, of mandamus to courts of inferior jurisdiction, and of *quo warranto* as to all officers of the commonwealth whose jurisdiction extends over the state, but shall not exercise any other original jurisdiction. They shall have appellate jurisdiction by appeal, *certiorari*, or writ of error in all cases, as is now or may be hereafter provided by law."

In the consideration and discussion of this section of the constitution we throw out of view the copious citations which have been furnished us from the debates in the convention. They are of value as showing the views of individual members, and as indicating the reasons for their votes; but they give us no light as to the views of a large majority who did not talk; much less of the mass of our fellow citizens whose votes at the polls gave that instrument the force of fundamental law. We think it safer to construe the constitution from what appears upon its face, nor do we propose to go beyond the necessities of this case. Other delicate questions may arise in the future upon this section, and we leave them until they are presented.

From this section, we may gather, with reasonable certainty, the following: (1) That the jurisdiction of the supreme court extends over the entire state; (2) that the justices thereof are *ex officio* judges of the oyer and terminer in every county of the commonwealth; and (3) that the original jurisdiction of the court, excepting in the excepted cases, is abolished.

The first two propositions are not new. They existed in prior constitutions, and conferred no additional power. The third is a limitation of our power as formerly exercised, by taking away a portion of our original jurisdiction. That it was intended to sweep away the court of *nisi prius*, in which our original jurisdiction had been generally, if not wholly, exercised, was not left open to conjecture; as it is expressly declared by the twenty-first section of the fifth article that "the court of *nisi prius* is hereby abolished, and no court of original jurisdiction to be presided over by any one or more of the judges of the supreme court shall be established." It is contended that this language, in connection with the third section of article 5, takes away all our powers as justices of the oyer and terminer. We do not so understand the constitution, nor does it so read. Conceding for the purposes of this case, that we

may no longer try a case brought into this court, at *nisi prius*, it is begging the question to say we may not try it at all. The constitution must be so read as to give effect to all of its parts; and where it distinctly says that the judges of this court shall be *ex officio* justices of the oyer and terminer and general jail delivery in every county in the state it means something. It is not an idle phrase, inserted for mere sound or to fill up space. It was not new; it was taken literally from the constitution of 1838. It was known to the convention that this court had, in several cases, placed a construction upon this clause. It is sufficient to refer to a single case, (*Com. v. Ickhoff*, 33 Pa. St. 80,) in which it was distinctly held that "each of the judges of this court has power to hold a court of oyer and terminer and general jail delivery in any county of the state." It was said by Chief Justice Lowrie: "This is a cause in the oyer and terminer, and the president judge, within whose jurisdiction it falls, represents to us that there is a legal impediment that prevents him hearing it, and asks us to send one of the judges of this court to try it. We think that we are bound to do so. We know of no legal or constitutional authority for any judge of the common pleas to hold a court of oyer and terminer out of his district, and when such a court is held by judges of the common pleas, it requires two to make a quorum, the president being one. Const. v. 5. But the jurisdiction of this court extends over the whole state, and its judges are, by virtue of their office, justices of oyer and terminer and general jail delivery in the several counties; and the judges of the common pleas cannot hold an oyer and terminer or jail delivery court while the supreme court, or any of them, are sitting in the same county for criminal trials. Const. art. 4, 5. This makes it appear plain that each judge of this court has power to hold a court of oyer and terminer or of general jail delivery in any county of the state. They are severally justices for this purpose, and, no quorum being established, each of them has full and equal authority to hold such courts. "Any of them sitting in the same county excludes the jurisdiction of the common pleas judges; and this can mean no less than any of them had jurisdiction, and therefore excludes all other jurisdictions that are not superior."

That the same power exists now is beyond all controversy. From all that has been said, it would seem to be clear that the only change which the constitution makes in our powers in criminal cases is to prevent our trying indictments in the *nisi prius*. That court is dead without the hope of resurrection. But each judge has the power to sit and try indictments in any county of the state.

Much less does the constitution affect the power inherent in the court, and expressly conferred by statute, of removing criminal cases into this court by *certiorari*. It is not, strictly speaking,

original jurisdiction. A *certiorari* brings up a record for review; it is not the commencement of an original suit. The general powers of supervision over criminal cases, inherent to the king's bench, and expressly conferred upon this court by statute, means something more than the trial of the case before a jury. It means, in its broadest sense, that we shall see that every man charged with crime shall have a fair and impartial trial; that when it is made clear to us that a man cannot have such trial, either from an excited and inflamed condition of the public mind in the county where the indictment was found, or from feeling or prejudice on the part of the judge, or any other sufficient cause, we shall issue our *certiorari*, remove the record into this court, and send it down to another county for trial, and, if necessary, before one of the judges of this court. That it is a power to be exercised with extreme caution is admitted. That it may be abused is possible. But I can readily imagine circumstances in the future which would make the exercise of this power the only barrier between a good citizen and gross oppression. If the people shall be of opinion that it was unwisely conferred, or that it is being improperly exercised, they can change it by a modification of the fundamental law. The mere knowledge that such a power exists in this court it is believed will make its frequent use unnecessary.

The rule is made absolute; and it is ordered that the writ of *certiorari* issue as prayed for. When the record comes up we will be prepared to entertain a motion looking to a speedy trial of the cause.

(Dissenting opinion of TRUNKEY, J., omitted.)

2. Federal courts.

EX PARTE VALLANDIGHAM.

1863. SUPREME COURT OF UNITED STATES. 1 Wallace, 243.

(THIS case arose on a petition of Clement L. Vollandigham for a *certiorari*, to be directed to the Judge Advocate of the Army of the United States, to send up to this court, for its review, the proceedings of a military commission, by which petitioners had been tried and sentenced to be imprisoned for uttering treasonable and seditious words against the government of the United States.)

WAYNE, J., delivered the opinion of the court.

General Burnside acted in the matter as the general commanding the Ohio Department, in conformity with the instructions for the government of the armies of the United States, approved by the president of the United States, and published by the Assistant Adjutant-General by order of the Secretary of War, on the 24th of April, 1863.

It is affirmed in these instructions, that military jurisdiction is of two kinds. First, that which is conferred and defined by statute; second, that which is derived from the common law of war. "Military offences, under the statute, must be tried in the manner therein directed; but military offences which do not come within the statute, must be tried and punished under the common law of war. The character of the courts which exercise these jurisdictions depends upon the local law of each particular country."

In the armies of the United States, the first is exercised by courts-martial, while cases which do not come within the "rules and regulations of war," or the jurisdiction conferred by statute or court-martial, are tried by military commissions.

These jurisdictions are applicable, not only to war with foreign nations, but to a rebellion, when a part of the country wages war against its legitimate government, seeking to throw off all allegiance to it, to set up a government of its own.

Our first remark upon the motion for a *certiorari* is, that there is no analogy between the power given by the constitution and law of the United States to the Supreme Court, and the other inferior courts of the United States, and to the judges of them, to issue such processes, and the prerogative power by which it is done in England. The purposes for which the writ is issued are alike, but there is no similitude, in the origin of the power to do it. In England, the court of king's bench has the superintendence over all courts of an inferior criminal jurisdiction, and may by the plenitude of its power, award a *certiorari* to have an indictment removed and brought before it; and where such *certiorari* is allowable, it is awarded at the instance of the king, because every indictment is at the suit of the king, and he has a prerogative of suing in whatever court he pleases. The courts of the United States derive authority to issue such a writ from the Constitution and legislation of Congress. To place the two sources of the right to issue the writ in obvious contrast, and in application to the motion we are considering, for its exercise by this court, we will cite so much of the third article of the Constitution as we think will best illustrate the subject.

"The judicial power of the United States shall be vested in one supreme court, and in such inferior courts, as the Congress may, from time to time ordain and establish." "The judicial power shall extend to all cases in law and equity, arising under the constitution, the laws of the United States, and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers, and consuls," &c., &c., and "*in all cases affecting ambassadors, other ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction.*" In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with

such exceptions and under such regulations as the Congress shall make." Then Congress passed the act to establish the judicial courts of the United States, and in the thirteenth section of it declared that the Supreme Court shall have exclusively all such jurisdiction of suits pending or proceedings against ambassadors or other public ministers or their domestics or their domestic servants as a court of law can have or exercise *consistently with the law of nations*, and original, but not exclusive jurisdiction, of suits brought by ambassadors, or other public ministers, or in which a consul or a vice counsel shall be a party. In the same section, the supreme court is declared to have appellate jurisdiction in cases hereinafter expressly provided. In this section, it will be perceived, that the jurisdiction given, besides that which is mentioned in the preceding part of the section is an exclusive jurisdiction of suits or proceedings against ambassadors or other public ministers or their domestics or domestic servants, as a court of law can have or exercise consistently with the laws of nations and original but not exclusive jurisdiction of all suits brought by ambassadors or other public ministers, or in which a consul or vice-consul shall be a party, thus guarding him from all other judicial interference, and giving to them the right to prosecute for their own benefit in the courts of the United States. Thus substantially reaffirming the constitutional declaration, that the supreme court had jurisdiction in all cases affecting ambassadors and other public ministers and consuls, and those in which a state shall be a party, and that it shall have appellate jurisdiction in all other cases before mentioned, both as to law and fact, with such exceptions and under such regulations as the congress shall make.

The appellate powers of the supreme court, as granted by the constitution, are limited and regulated by the acts of Congress, and must be exercised subject to the exceptions and regulations made by Congress. In other words, the petition before us, we think not to be within the letter or spirit of the grants of appellate jurisdiction to the supreme court. It is not in law or equity in the meaning of those terms as used in the third article of the constitution. Nor is a military commission a court within the meaning of the 14th section of the Judiciary act of 1789. That act is denominated to be one to establish the judicial courts of the United States, and the fourteenth section declares that all the "before mentioned courts," of the United States shall have the power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, agreeably to the principles and usages of law. The words in the section, "the before-mentioned courts" can only have reference to such courts as were established in the preceding part of the act, and excludes the idea that the court of military commission can be one of them.

Whatever may be the force of Vallandigham's protest, that he was not triable by a court of military commission, it is certain that his petition cannot be brought within the 14th section of the act; and further, that the court cannot, without disregarding its frequent decisions and interpretation of the constitution in respect to its judicial power, originate a writ of *certiorari* to review or pronounce any opinion upon the proceedings of a military commission. It was natural before the sections of the third article of the constitution had been fully considered in connection with the legislation of Congress, giving to the courts of the United States power to issue writs of *habeas corpus*, *scire facias*, and all other writs not specially provided for by statute, which might be necessary for the exercise of their respective jurisdiction, that by some members of the profession it should have been thought, and some of the early judges of the supreme court also, that the 14th section of the act of September 24th, 1789, gave to this court the right to originate processes of *habeas corpus ad subjiciendum*, writs of *certiorari* to review the proceedings of the inferior courts as a matter of original jurisdiction, without being in any way restricted by the constitutional limitation, that in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. This limitation has always been thought restrictive of any other original jurisdiction. *The rule of construction of the constitution being, that affirmative words in the constitution, declaring in what cases the supreme court shall have original jurisdiction, must be construed negatively as to all other cases.* The nature and extent of the court's appellate jurisdiction and its want of it to issue writs of *habeas corpus ad subjiciendum* have been fully discussed by this court at different times. * * *

In the case of *Ex parte Milburn*, 9 Peters, 704, Chief Justice Marshall said, as the jurisdiction of the supreme court is appellate, it must first be shown that it has the power to issue a *habeas corpus*. In *re Kaine*, 14 How. 103, the court denied the motion, saying that the court's jurisdiction to award the writ was appellate, and that the case had not been so presented to it, and for the same cause refused to issue a writ of *certiorari*, which in the course of the argument, was prayed for. In *Ex parte Metzger*, 5 How. 176, it was determined that a writ of *certiorari* could not be allowed to examine a commitment by a district judge, under the treaty between the United States and France, for the reason that the judge exercised a special authority, and that no provision had been made for the revision of his judgment. So does a court of military commission exercise a special authority. In the case before us, it was urged that the decision in Metzger's case had been made upon the ground that the proceeding of the district judge was not judicial in its character, but that the proceedings of the military commission were so;

and further, it was said that the ruling in that case had been overruled by a majority of the judges in Raines' case. There is a misapprehension of the report of the latter case, and as to the judicial character of the proceedings of the military commission, we cite what was said by this court in the case of the United States v. Ferriera, 13 How. 48.

"The powers conferred by Congress upon the District Judge and the secretary are judicial in their nature, for judgment and discretion must be exercised by both of them, but it is not judicial in either case, in the sense in which judicial power is granted to the courts of the United States." Nor can it be said that the authority to be exercised by a military commission is judicial in that sense. It involves discretion to examine, to decide and sentence, but there is no original jurisdiction in the supreme court to issue a writ of *habeas corpus ad subjiciendum* to review or reverse its proceedings, or the writ of *certiorari* to revise the proceedings of a military commission.

And as to the President's action in such matters, and those acting under his authority in them, we refer to the opinions expressed by this court, in the cases of Martin v. Mott, 12 Wheaton 28 and Dynes v. Hoover, 20 How. 65.

For the reasons given our judgment is, that the writ of *certiorari* prayed for to revise and review the proceedings of the military commission, by which Clement L. Vallandigham was tried, sentenced and imprisoned, must be denied, and so we order accordingly.

Certiorari refused.

Under the act of Congress organizing the Court of Appeals, provision is made for review of decisions in said courts by *certiorari* from the Supreme Court. So also of the judgments of the Court of Appeals of the District of Columbia.

The writ has often been issued by the United States Supreme Court in aid of its appellate jurisdiction.

Note to

WASHINGTON AND BERESFORD v. HUGER.

1794. COURT OF CHANCERY OF SOUTH CAROLINA. I Desaussure
361.

THIS case being dependent in the court of chancery of South Carolina, Mr. Hamilton, British Consul at Norfolk, and a creditor of the late Benj. Huger, who had forced the sale of the Richmond land, pending this suit, and had become the purchaser, petitioned the court, to be let in to protect his rights; and he was allowed to come in as a party to the proceedings. Afterwards, and before the trial

of the cause he obtained a *certiorari* from the circuit court of the United States to remove this cause from this court to the circuit court of the United States. This writ was served on the court, and after time taken to deliberate, the court refused to obey the *certiorari* and gave the following reasons for its determination: By the Court. The suit pending in the court is between citizens. An alien applies by petition to be allowed to come in and defend his interests. This was granted. Since which he has applied for a *certiorari* to remove the cause up to the circuit court of the United States. A writ of *certiorari* is a writ issued by a superior to an inferior jurisdiction, commanding the removal of the cause from the latter to the former court. But this is not an inferior court to that from whence the mandate issues. No law of the United States declares it inferior or impeaches its equality. All that the judiciary act of Congress provides for, is, to give a party defendant, who is not a citizen of the state where the suit is instituted, a right to apply by petition to this court to have the cause removed into the court of the United States. That is the form prescribed and that excludes other forms not provided by the act. This does not warrant the use of the mandatory form of *certiorari*. But it is said that the power given to the courts of the United States to issue "all other necessary writs," includes the use of this writ and warrants it. This is denied. The act of Congress has previously pointed out the mode of proceeding for the removal of a cause from this court to the court of the United States, which has jurisdiction, viz. by filing a petition on entering the application for the removal of the cause. It could not be intended that the same purpose might be effected by a totally different process, under a few general and loose words in another part of the act. The court acts under the sanction of an oath to obey the laws of the United States as well as those of the state under whose authority the court sits and acts. Looking to those laws, the court is of opinion, that the writ of *certiorari*, now presented, is not warranted by the words of the act of congress, or by any reasonable construction of them. The court is not therefore bound to pay any attention to it. Nor would the court have obeyed the writ of *certiorari*, if it had been issued by the supreme court of the United States, to remove the cause thither, because that court has only appellate jurisdiction (see 22d section of the judiciary act) after final decrees and judgments, in cases determined in the circuit courts, brought there by original process, or removed there from the courts of the several states, or by appeal from the district courts. And the supreme court has no appellate jurisdiction in cases determinable in the state courts, between citizens of the same state, except in the case of title to land, where the parties, though citizens of the same state, derive title under grants from different states.

The act of congress directs, that where a suit is commenced in a state court, by a citizen of that state, against an alien or a citizen of another state, on the defendant's entering his appeal, filing his petition, and offering security, on the first day of the term, the state court shall proceed no further in the cause. The present party has not pursued the course prescribed by law; he has not applied by petition, nor offered security—the court will therefore pay no regard to the unauthorized course he pursued, of obtaining a *certiorari*; but will proceed with the cause under consideration as the law of the state authorizes.

It appears by a note of Chancellor Matthews, on his brief, that in some shape this question was discussed before the federal court, and that "the federal court on the appeal to them determined that Hamilton, having appeared in this court, by his petition (to be heard) has made his election into what court he would go; and having acknowledged the jurisdiction of this court, that (the federal court) would not take cognizance of the cause."

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3. State courts.
a. Supreme Courts.

WHITEHEAD v. GRAY ET AL.

1830. SUPREME COURT OF NEW JERSEY. 12 N. J. 36; *supra* p. 595.

COMMONWEALTH v. BALPH.

1886. SUPREME COURT OF PENNSYLVANIA. 111 Pa. St. 365; 3 Atl. 220. *Supra* p. 607

FARMINGTON RIVER WATER POWER CO. v. COUNTY COMMISSIONERS.

1873. SUPREME JUDICIAL COURT OF MASSACHUSETTS. 112 Mass. 206; *supra* p. 539.

STATE v. SWEPSON.

1880. SUPREME COURT OF NORTH CAROLINA. 83 N. C. 584.

DILLARD, J.—A motion was made in this case at August term, 1879, of Wake superior court to amend the record of the minute docket of Spring term, 1875, so as to show that defendant Swepson,

was not present at the time of the trial, verdict and judgment, then and there had in the case, and the judge presiding refused to hear evidence as to the proposed amendment or to allow the same on the ground of want of power, and from that judgment the solicitor for the state appealed to this court.

That appeal was held unauthorized and the same dismissed for reasons set forth in the opinion reported in the case, *State v. Swepson*, 82 N. C. 541, and thereupon the present application was made for a writ of *certiorari* to remove the said record and proceedings on the motion to amend in said cause into this court, for such action thereon as by law may be authorized. So the only question for our consideration in this petition is as to the right of the state to have the writ prayed for as a substitute for an appeal, or as a remedial writ by which to enable this court to supervise and rule upon the decision of the superior court to entertain the motion to amend the record on the ground of a want of power.

The jurisdiction of the court is appellate, extending to a review of the errors of law apparent on the record of the judgments of the superior courts; and it is original as advisory in claims against the state, in petitions to rehear its own judgment, and in the supervision and control of inferior courts. And the mode by which its appellate jurisdiction is called into exercise, is by appeal, which is regulated by statute, and is in the place of the writ of error from the king's bench at law and appeal in chancery under the English system; while in its original jurisdiction, the mode is, in claims against the state as prescribed in the statute, in petitions to rehear as prescribed by the rules of the court, and in the supervision and control of the proceedings of inferior courts by any remedial writs necessary to that end as prescribed in the constitution. Art. IV, § 8.

In this state in criminal actions, the defendant may in all cases appeal and have the judgment against him reviewed for errors of law apparent on the record, or assignable on the statements of the case of appeal, which is in lieu of a bill of exceptions; and so may the state appeal, but the right in the case of the state is without any bill of exceptions, and is restricted by the decisions of this court to errors of law on the face of the judgments adverse to the state on demurrer to the indictment, or on motion to quash, or in arrest or on a special verdict. *State v. Swepson*, 82 N. C. 541; *State v. Lane*, 78 N. C. 547; *State v. Bobbitt*, 70 N. C. 81; *State v. Padgett*, 82 N. C. 544. And in cases of appeal lost without laches, the accused in all cases, and the state in the instances aforesaid, may have a writ of *certiorari* from this court as a substitute for an appeal.

From these established rights respectively of the state and defendant, it results the judgment sought to be amended being one

in favor of defendant on a trial and verdict of a jury, that the case was not one of those in which our decisions allow a right of appeal to the state, either from the original judgment or that of refusal to entertain a motion of amendment of the record and therefore no appeal lay for the state. But whether a *certiorari* may be issued in such cases to bring up the record for our review of the original judgment as on a writ of error it is not necessary to determine, as we are of opinion that the case presented on the petition, under consideration, the writ must be ordered upon a distinct ground which will appear upon a further discussion of the case.

The court of King's Bench in England always had a superintendency of the inferior courts, moving them to exercise their proper jurisdiction or withholding them from exceeding it, or reversing their judgments, and as a means by which to exert such supervision and control, various remedial writs were used, and among them the *certiorari* in all cases to remove the proceedings from an inferior court of record into that court; for otherwise it would have nothing to act upon, and the proceedings when certified up were the basis of an action for a *procedendo*, prohibition, mandamus, or reversal for error of law, treating the *certiorari* in the last case as in the nature of a writ of error. 3 Blackstone 109 to 113, 41 to 43; and 4 *ibid.*, 3392; 2 Chitty's Prac, 353, 354; 1 Tidd's Prac. 397, 398, 400, and 715.

This superintending power of the king's bench rested on the idea of necessity of such an authority to an orderly exercise of jurisdiction by all the inferior courts within their prescribed limits, and to a uniformity in the administration of the law; and such its power was often referred to in our state, and a similar power was admitted to exist in our supreme court. With us it was held in divers cases that the superior court in the exercise of supervision and control over other courts inferior to itself, had the right to employ the writ of *recordari* or *certiorari* according to the character of the court whence the proceedings were to be removed, the same being ordinarily used as substitutes for appeal, but capable of being used the first, in some cases as a writ of false judgment, and the latter as in the nature of a writ of error, especially where the writ of appeal was not expressly denied, but simply not provided for, among which cases may be cited the following: Brooks v. Morgan, 5 Ired. 484, 485; Hartsfield v. Jones, 4 Jones 310; Parker v. Gilreath, 6 Ired. 221; Webb v. Durham, 7 Ired. 130; Leatherwood v. Moody, 3 Ired. 129.

In the case of Brooks v. Morgan, Chief Justice Ruffin, speaking for the court, acknowledged the superior courts to have always exercised a supervision and control here, as did the king's bench in England, and pronounced the existence of such a power as es-

sential wherever law was the true and only standard of justice, besides being necessary to a uniform and regular administration of the law. And the court there held that in order to the correction of errors of law in the proceedings of the inferior courts, the writ of *certiorari* was the proper means to be used.

In the case of *State v. Swepson*, 81 N. C. 571, removed from Wake to Franklin, the judge held that the case was not at issue before its removal and ordered it to be remanded to Wake county, and no right of appeal from that order existing for the state, the proceedings were brought into this court on *certiorari*, and we held the case to have been at issue and reversed the ruling in the superior court. And but for the existence of the power of supervision in that case, the order of removal being sufficient to put the case out of Wake court, and the court in Franklin County having refused to proceed in it, there would have been a total failure of the prosecution without a trial anywhere.

Such a power of supervision and control perhaps exists in the superior courts under our present system in respect to the courts inferior to them, but certainly it exists in this court by express grant as contained in our constitution (Art. IV, § 8), wherein it is provided that besides the appellate powers of the court, it shall have power to issue any remedial writs necessary to its supervision and control of the proceedings in the inferior courts.

Thus it would seem indisputable that the court has the power to supervise and control the proceedings in the superior courts, and to that end may issue any writs necessary and proper, of which the writ of *certiorari* is the appropriate one as we have seen.

The grievance in this case is, that on a motion by the state, to amend the record of the trial, verdict and judgment of the superior court of Wake at August term 1875, in the case of the *State v. Swepson*, the judge refused to hear evidence in support of the proposed amendment on the ground of want of power, and thereupon the only question is, was the refusal to entertain the motion for the reason alleged such an error as to require correction in the exercise of the supervisory power conferred on this court, and is the writ of *certiorari* a fit and proper writ to be issued?

Of the power of the superior court of Wake, and indeed of any court, to amend its records and for that purpose to hear evidence, and thereupon to so amend the record as to make it speak the truth, there can be no doubt. *State v. King*, 5 Ired. 203; *State v. Davis*, 80 N. C. 384; *State v. Craton*, 6 Ired. 164; *State v. Reid*, 1 Dev. & Bat. 377, and other cases. But it is equally well established that the propriety of an amendment and the particulars wherein it is to be amended are matters discretionary with the judge, and if in the exercise of his discretion, the amendment is

refused, then no appeal nor *certiorari* in the nature of a writ of error lies to review the judgment. *Stephenson v. Stephenson*, 4 Jones 472; *Bright v. Sugg*, 4 Dev. 492; *Winslow v. Anderson*, 3 Dev. & Bat. 9; *Anders v. Meredith*, 4 Dev. & Bat. 199; and *Freeman v. Morris*, Busb. 287.

If however the judge refuse to entertain a motion to amend and to hear the evidence on the ground of a want of power, *then he fails to exercise his discretion*, and therein a question of law is made, which is reviewable on appeal where that is allowed; and in state cases where no appeal is allowed it is an error which may be brought up and reviewed in the exercise of the supervisory power of this court by a writ of *certiorari*, as was done in the case of *State v. Swepson*, 81 N. C. 571.

It is our opinion, taking the facts stated in the petition to be true, there was error in the refusal of the judge, on the ground of want of power, to entertain the motion of the state to amend the record, and being satisfied of our jurisdiction to have the record certified into this court for supervision by us, it is ordered that the writ of *certiorari* prayed for be issued returnable to the next term of this court.

Per curiam. Motion allowed.

For a careful summary of the constitutional and statutory provisions in the various states respecting the jurisdiction of the supreme courts, see 4 Enc. of Pl. & Pr. 15 ff.

In Connecticut the writ of *certiorari* seems rarely if ever issued. *Williams v. Hartford & C. R. Co.*, 13 Conn. 110.

In Michigan and Missouri the Supreme Court will refuse the writ when the same can be sought for and obtained from a lower court. *White v. Boyce*, 88 Mich. 349; *State v. Cooper Co.*, 64 Mo. 170.

b. Lower courts of original jurisdiction.

SWIFT, RECORDER, ETC., v. WAYNE CIRCUIT JUDGES.

1887. SUPREME COURT OF MICHIGAN. 64 Mich. 479; 31 N. W. 434. *Supra* p. 569.

In some of the states power to issue the writ has by statute been conferred upon such inferior tribunals and officers as probate courts, county courts, justice courts, circuit court commissioners, circuit and district court clerks, etc.

While at common law the writ could not be granted at chambers or in vacation because it was not a writ of right but dependent upon the discretion of the court, in a number of states, however, this rule has been altered either by statute or the rules of practice.

In California the right to issue the writ in vacation or at chambers is expressly denied by statute. Cal. Code, Civ. Proc. § 165.

Section 3.—“The Parties.”**I. Plaintiff.****STARKWEATHER v. SEELEY.**

1865. SUPREME COURT OF NEW YORK. 45 Barbour 164.

By the court, JOHNSON, J.—The defendant has not sued out the *certiorari* in this case, and does not appear. For aught that appears, he acquiesces in the determination of the county judge in the proceedings before him, and such is the presumption of law. The *certiorari* is brought by one Silas Leonard, who was not a party to the proceedings before the county judge, and who, as appears from the case before us, had no notice of them whatsoever until he was dispossessed, by the officer who executed the warrant issued by the judge, of the premises, and the plaintiff put in possession. The proceedings were all against the defendant, as the tenant of the plaintiff, holding over, and continuing in possession, after the expiration of the term created by his lease. It would seem from the affidavit on which the writ of *certiorari* was allowed, that Leonard was in the possession of the premises and had a contract to purchase them from the alleged tenant Seeley. The contract is set out in full, but does not in terms give to Leonard the right of possession of the premises. The matters stated in the affidavit, however, on which the writ was allowed, are no part of the record, and cannot be noticed for the purpose of determining either the regularity or the validity of the proceedings before the county judge. The record is the return of the county judge, and it is by that alone that the proceedings before him must stand or fall. According to the return, the proceedings before the county judge appear to have been all regular. The proper affidavit was made to give the judge jurisdiction to issue the summons. The summons was regularly issued and served upon the party against whom it was directed, and duly returned. At the return day, or the time appointed in the summons for showing cause, no one appeared to show cause, whereupon the judge, as required by statute, issued his warrant in the form which the statute prescribes, commanding the officer “to remove all persons from the said premises and to put the said applicant to the magistrate into the full possession thereof.” (2 R. S. 514, § 33.) It appears by the return of the officer who executed the warrant that he had executed it by putting the plaintiff into possession, and by dispossessing Silas Leonard, and all other persons whom he found in possession. This is all we can gather from the return, as to any connection of Leonard with the premises, in any way whatever. And look-

ing to the return alone, without any reference to Leonard's affidavit, no error appears in the proceedings. There was nothing before the judge to show, or suggest the idea, that anyone but Seeley was in possession, or claimed any right thereto, and the record shows nothing different. It is only by the extrinsic facts which appear in the affidavit, and which were not before the judge, that any error is made to appear. And these, as before suggested, cannot be accepted as facts for the purpose of determining the questions properly arising here. I do not see, therefore, how the proceedings, which appear to have been all regular, can be reversed or quashed by us. It may be that Leonard was wrongfully turned out of possession, or may not. If he was, he has his remedy in some other manner to recover the possession of which he has been unlawfully deprived. Being no party to the proceeding before the county judge, and having no notice of it, he is clearly not bound by the determination, and it can constitute no bar to an action brought by him to recover his possession. He may still have redress, though in another form, upon making sufficient proof of his rights, on the trial of his action.

It is claimed by the plaintiff's counsel that Leonard has no right to the writ of *certiorari* to review the proceedings before the county judge, inasmuch as he was not there a party in form and substance having according to his own showing no conventional relation as tenant to any one, and certainly not to the plaintiff or landlord in the proceedings. In the view I have taken of this case it is not perhaps necessary to decide this question. I am inclined to the opinion, however, that the objection is well taken. He might have made himself a party.

The 34th section of the statute, above referred to, authorizes any person in possession of the demised premises, or any person claiming possession thereof, at the time appointed for showing cause, to come in and file his affidavit with the magistrate who issues the warrant, denying the facts upon which the summons was issued, or any of them, and to have the matters thus controverted tried by a jury. It is obvious that a person, though not named in a summons, having connected himself with the proceeding in this way, might have his writ of *certiorari* to review the proceedings to which he was thus a party. But Leonard, so far as the record shows, may have been a mere stranger to all parties, or a mere agent or servant of Seeley. It is answered, that having no notice or knowledge of the proceeding, it was impossible for him to make himself a party. But I do not see that this affects the question. True, he has been dispossessed under the general terms of the warrant; but his legal rights are not concluded or in any wise affected by the warrant, or the determination upon which the warrant was issued.

I think the true test as to the right of review is, *was the person seeking to review, a party in form or substance to the proceeding sought to be reviewed so as to be concluded by the determination thereof?* If not, although his rights may have been infringed by an improper execution of the process, I think he cannot bring up the matter for review. If my brethren agree with me in this view, the writ should be quashed. Proceeding upon the other view, that Leonard is a party in substance and effect, and has properly sued out this writ as such, if no error appears upon the record, the determinations and proceedings should be affirmed. Such a determination of this proceeding might possibly conclude him, or at least embarrass him in the prosecution of another remedy. I am of the opinion that the writ should be quashed, and Leonard pay the costs.

Judgment accordingly.

BATH RIDGE & TURNPIKE CO., v. MAGOUN ET ALS.

1832. SUPREME JUDICIAL COURT OF THE STATE OF MAINE.
8 Maine 292.

(By private statute the court of sessions was authorized to construct a county road from Bath to Brunswick. Said road was located and order constructed on a line practically parallel with plaintiff's toll-road, whose tolls would be greatly diminished by the opening of said road. Plaintiff petitions for a writ of *certiorari* to quash the proceedings of the court of sessions; alleging, for errors, that the road was laid over navigable waters, that the commissioners did not act under the authority of the statute, that the road was not laid from town to town, and that the two towns never gave their consent in the manner and form provided by the act.)

MELLEN, C. J., delivered the opinion of the court.

On inspection of the record of the location of the road described in the application, we entertain no doubt as to the irregularity of the proceeding, on account of the non-compliance with the condition of the act authorizing the location over the tide waters therein described; and we should immediately grant the writ, as prayed for, were we not satisfied that we have no authority to grant it on the present petition. From the facts before us we have no doubt that the road, the location of which is complained of, if completed, would indirectly be essentially prejudicial to the private interest of the corporation; but such an indirect interest does not authorize the interposition of the corporation in this mode.

In some respects there is a difference between a writ of error and a writ of *certiorari*, and in some respects there is a strong resemblance. The former lies where the proceedings are according to the course of the common law; in other cases a *certiorari* is the proper writ. A writ of error is a writ of right; a writ of *certiorari* is not; it is a matter of sound discretion to grant or refuse it. There are several other points of difference. They are alike in this, that no one but a party to the record, or one who has a direct and immediate interest in it or is privy thereto, can maintain either of these writs. *Porter v. Rumery*, 10 Mass. 64. *Shirley v. Lunenberg*, 11 Mass. 379. *Grant v. Chamberlain*, 4 Mass. 611. *Haines v. Corliss*, *ib.* 659. *Glover v. Heath*, 3 Mass. 252. In the above cases the rights and interests of heirs, devisees, executors, and administrators, are recognized as well as those of the original parties; but we are not aware that those not having any such right or interests, are entitled to either of the before mentioned writs. Numerous cases have occurred, and many are reported, in respect to the location of roads, etc., but they have always been prosecuted by those having a direct, legal, statute interest in the proceedings complained of. As our laws on this subject now stand, the individuals whose land is appropriated for the road have a direct interest of a pecuniary character. So has the county, because liable by law to pay to the owner the estimated value of the land so appropriated. So has a town, because by law bound to make the road and keep the same in repair. On application for a *certiorari* it is usual to notify one or more of the petitioners for the road, as being parties on the record. In the case before us the corporation does not present itself in either of the above mentioned characters. It is a stranger to the record and has not any direct statute interest in it. Any injuries it may sustain are of a remote and incidental character. Suppose that by the location of a new road, the stages, and travellers of various kinds, are induced to leave the old road and a long established and profitable hotel, by means of which it becomes useless, and the owner is deeply injured in his property; surely these circumstances would not clothe him with the rights of a party and authorize him to prosecute a writ of *certiorari* for the purpose of obtaining a quashment of the proceedings by which the road is located. For the reasons above given, a

Writ of *certiorari* is not granted.

See also *People v. Mayor of New York*, 5 Barb. (N. Y.) 43; *Coddington v. Stanton*, 7 N. J. L. 84; *Goodell v. Kalamazoo*, 63 Mich. 416; *Lamar v. Commissioners*, 21 Ala. 772; *People v. Morgan*, 65 Barb. (N. Y.) 473; *Conklin v. Fillmore Co.*, 13 Minn. 454; *Cushing v. Gay*, 23 Me. 9; *Wolpert v. Newcomb*, 106 Mich. 357; *Perkins v. Holman*, 43 Ark. 219; *Davis v. Horn*, 4 G. Greene (Ia.) 94.

DEXTER v. TOWN COUNCIL OF CUMBERLAND.

1891. SUPREME COURT OF RHODE ISLAND. 17 R. I. 222; 21 Atl. 347.

STINESS, J.—The petitioner represents that he is the owner of land within 200 feet of the building for which the town council of Cumberland has granted a license to sell intoxicating liquor. He alleges that said license was granted without the notice which is required by statute, and also that the owners of the greater part of the land within 200 feet of said building filed their objections in writing to the granting of the license. We do not find from the record that this last averment is sustained. The question, therefore, arises whether this petitioner is entitled to object to the record upon the ground of an improper notice; and also whether the notice given was so far short of the requirement of the statute as to invalidate the proceedings of the town council in granting the license.

Certiorari lies not only to review the decisions of inferior courts, but also the determinations of special boards, exercising a judicial power, affecting the rights or property of citizens, where no other legal remedy is provided. It is not necessary that the applicant should be a party to the record, but only that he should be interested in the subject matter upon which the record acts. *Dyer v. Lowell*, 30 Me. 217. A special power is conferred upon town councils and license commissioners to grant licenses, by Pub. Laws, c. 816, § 2; of August 1, 1889; but, before exercising this power, it is necessary to determine whether the precedent requirements of the statute have been complied with and also whether the owners of a greater part of the land within 200 feet of the place proposed object in writing to the granting of such a license. These determinations are of a judicial nature, upon which the jurisdiction of the board depends, and they may therefore be reviewed. General remonstrances appeal only to the discretion of the board, and are not reviewable. The owners of land within 200 feet of a place proposed for a license are regarded by the statute as having such a special and peculiar interest, distinct from that of the public, in the subject matter, that the owners of a greater part of such land may, by their objections in writing, prevent the granting of a license altogether. To insure this right of objection the statute provides that notice shall be given, by advertisement in a newspaper of the town, or, if none, in a newspaper of the county, for at least two weeks of the particular location for which a license is requested. We think the petitioner has, under this statute, such a right or interest in the subject matter, as to entitle him to apply for this writ. In *Murray v. Supervisors*, 23 Cal. 492, the plaintiff, owner of a ferry franchise over Mercer River, averred that

the board of supervisors, without the notice required by statute, granted a ferry license to another to run a ferry across said river about twenty rods above the plaintiff's place, no such ferry being required by public convenience; that the reason given by the board in their minutes for granting the license, was that due notice of the application had been given, and no legal excuse was shown why it should not be granted. The complaint was held to be sufficient to authorize a writ of *certiorari*. The case is hardly distinguishable from the case at bar. In the petition of the Rhode Island Society for Encouragement of Domestic Industry, for a writ of *certiorari*, filed at this term, the court held, upon a motion to dismiss, that an owner of land within 200 feet was a proper party to prosecute the application; but when it afterwards appeared that the objections filed did not embrace the owners of a greater part of the land, no defect of notice being set forth, the court held that the petitioner then stood in no different position from any general remonstrant, and, as such, was not a proper party to prosecute, whereupon the motion to dismiss was granted. In the present case the insufficiency of the notice is specially set forth. When due notice has been given, and the requisite number of land owners do not object to the license, it is then a matter of discretion with the board whether to grant a license or not. Over such a conclusion this court has no control. But the owners of land have a peculiar interest in the matter of due notice. If the particular location is not named as required by statute, they have no means of knowing whether to object or not; their attention is not directed to the place which may affect them and to which they have a right to object. The omission to state the particular place may be the very reason why the required number do not appear, and thus they may be misled, when otherwise they could have prevented a license at that place. They therefore have a direct and special interest in the matter; and, as individuals, they have no other remedy than *certiorari*. A criminal prosecution of the license, or an information by the attorney-general, can hardly be said to be a remedy for them. * * *

(The court held that the notice was insufficient and that the town council, therefore, had no jurisdiction to grant the license; that its proceedings therein were erroneous and ordered the same to be quashed.)

HOLDEN v. VILLAGE COUNCIL OF LAMBERTON.

1887. SUPREME COURT OF MINNESOTA. 37 Minn. 362; 34 N. W. 336.

DICKINSON, J.—It is sought by means of the writ of *certiorari* to bring here for review the alleged unauthorized and illegal action of the village council of the village of Lamberton in recanvassing the votes cast at the general village election in March, 1887, upon the question whether licenses shall be granted for the sale of intoxicating liquors; and in the granting of such licenses, contrary to the vote of the people at that election. It is alleged in the petition, that the village council without any authority or jurisdiction to do so, recanvassed the vote in June following the election; and having them rejected, as illegal, one vote which has been cast “against license” declared the vote to be a tie, and hence not opposed to the granting of licenses. Thereupon licenses were granted.

These facts shown by the relator’s petition do not, upon his own theory as to the powers of the respondents, present a case for the granting of this writ. The relator claims the action of the council in recanvassing the votes, and redetermining the result of the election to have been wholly without authority of the law; and the return more fully shows this to have been the case. Whether the council had authority at any time, and as a part of the election proceedings, to canvass the votes, and declare the result of the election, we do not consider. The act complained of was not such a proceeding. Upon the application of certain persons for license, some three months after the election, a hearing was had before the council, at which they assumed to investigate and determine the legality of a certain vote, and thereupon to determine that the result of the election was different from that which they had before declared. This was a mere usurpation of authority, and wholly without legal effect. As determined in *State v. Mayor of St. Paul*, 34 Minn. 250, 25 N. W. 449, the writ of *certiorari* will not be granted for the purpose of reviewing such nugatory proceedings. The act of the council in granting the license was not of a judicial character, and therefore will not be reviewed under this writ.

There is a further reason why the writ should be quashed, in that the relator has no peculiar interest in the matter in question. It is not enough that he is a resident and taxpayer in this village. In general, *courts will not review and correct the official action of public officers at the suit of private individuals who have no peculiar interest therein, nor will they be allowed to sue out such writs as this for that purpose.* *Conklin v. Commissioners Fillmore Co.*, 13 Minn. 454 (Gil. 423); *Smith v. Yorán*, 37 Ia. 89; *News Co.*

v. Harris, 62 Ia. 501, 17 N. W. 745; and see Darling v. Boesch, 67 Ia. 702, 704, 25 N. W. 887.

The respondent's motion to quash the writ is granted.

See also State v. Heege, 37 Mo. App. 338; Darling v. Boesch, 67 Ia. 702; McCreary v. Rhodes, 63 Miss. 308; Iske v. Newton, 54 Ia. 586; Lexington v. Sargent, 64 Miss. 621.

Any person, a citizen and taxpayer, may appear as plaintiff to review the action of taxing boards and commissioners;—Orr v. Board of Equalization, 2 Idaho 923; Biddle v. Riverton, 58 N. J. L. 289; People v. Supervisors, 57 Barb. (N. Y.) 377; Collins v. Davis, 57 Ia. 256; People v. Morgan, 65 Barb. (N. Y.) 473; Stroud v. Consumers' Water Co., 56 N. J. L. 422. But see State v. Middleton, 24 N. J. L. 124.

MORRIS CANAL & BANKING COMPANY v. THE STATE.

1834. SUPREME COURT OF NEW JERSEY. 14 N. J. L. 411.

(CERTIORARI in the name of the state against P, S and C, commissioners, commanding them to certify their proceedings touching the estimate and appraisal of certain lands, etc., taken and occupied by plaintiff for the purpose of a canal between the Passaic and Delaware rivers.)

HORNBLOWER, C. J.—It is objected that the state has improperly been made a party to this suit.

The name of the state, cannot, with legal propriety, be used upon every occasion, and therefore it ought not to be introduced upon the record, as a party, at the mere pleasure of every person who may think fit to use it. There ought to be, and one would think our books would furnish, some known and settled rule on the subject; yet such has been the diversity of practice in relation to this matter, that the reports afford no guide to the profession, but are rather calculated to distract and mislead the practitioner.

Perhaps from the very nature of the writ of *certiorari* and the ever new and varying occasions for its use, no very definite and precise rules can be prescribed in relation to the parties in whose names as plaintiffs, or against whom as defendants, it should be issued yet by a little attention to general principles, and legal analogies, much uncertainty and litigation may be avoided in this matter.

In the State v. Kirby, 2 South. 835, the Chief Justice (Kirkpatrick) said "*the state can be made plaintiff only when the public interest, the public peace, or the public order and economy are concerned.*" But it is easier to lay down a general proposition, than to carry it out in practice, and to apply it to particular cases. For instance, it has been argued that the state is always interested to see that the laws are obeyed, and properly executed;

and therefore if corporations, commissioners or other persons, acting under a particular statute, or exercising a special authority, mistake their duty, or act unlawfully, the state, watchful over the rights of individuals, and bound to protect them, steps in to the aid of the citizen, and tenders the use of its name in the prosecution or defence of those rights. But the same course of argument would lend the name of the state to every individual, in every action, he might think proper to bring against any public officer, or person acting under color, or authority of law. The same has an interest, in a political sense, in everything done within its jurisdiction. Public peace, order, security and economy, are more or less, involved in every dispute and lawsuit that happens. Why not, then, lend the name of the state to every man who seeks to enforce a contract with, or to recover damages from, his neighbor for an injury done to his person or property? But, I apprehend, the state is never properly plaintiff in *certiorari*, where the object of the writ is to relieve individuals in matters affecting their private rights; unless the proceeding complained of has been instituted and carried on, by the state, in its corporate and political character, and for political or municipal purposes—in other words, *the name of the state cannot be used, as plaintiff in certiorari, except in those cases in which the individual, for whose benefit, or relief, it is sued out, cannot, upon legal principles, be himself the plaintiff; or where the state or the whole community have some rights, or interests in the subject matter; not speculative or political, but direct and positive rights and interests, which are to be affected one way or the other.* This will be found to embrace an extensive class of cases, relating to the public peace, the public revenue, the public defence, common and public highways, and many other cases of general interest and concern. In short, whenever the authority, or the interest, of the state, in the prosecution of any of the great purposes of government comes into conflict with individual rights, and the state, either in its corporate name, or by its appropriate agents, is the actor, in carrying into execution those purposes; then the name of the state may be used by an individual complaining of, and seeking to be relieved against its proceedings. In such cases, the state yields a tacit consent to be made plaintiff in *certiorari* where that is the proper remedy, for the purpose of affording the citizen an opportunity of being heard in this court, and having the error corrected, if any has been committed.

The case of *The State v. Kirby*, 2 South. 835, is at once an authority for, and an illustration of, the rule I have attempted to prescribe. The chief justice in that case, says—"the *certiorari* is to be entitled at the suit of the state where its object is to bring into review, proceedings which arise upon municipal regulations,

made for the public benefit, and public convenience or the public safety. In the execution of these regulations, the state is always the actor, carrying them into effect, either in its ordinary courts of justice, or by special commissioners, or agents, appointed for that purpose, etc." In the same case it was objected that Kirby, the justice, ought not to have been styled defendant, but that the writ ought to have been entitled as between the state, plaintiff, and the person charged with the fine and seeking relief, defendant; and though the chief justice considered it so much a matter of form as not to be fatal, yet he and Mr. Justice Southard, concurred in opinion that the justice was improperly made defendant—that it being a case in which the state was properly plaintiff, the writ ought to have been entitled against the individuals who were seeking to avoid the fines—they, having been proceeded against by the state, as delinquents, could not turn round and use the name of the state, in a suit against the justice, or anybody else, to reverse those proceedings. So, I apprehend, in this case, the *certiorari* ought to be between the same persons who were the parties in interest, in the action below. If the state, in its corporate and political character, had anything to do in the proceedings complained of, it was a matter between the state on the one side, and the landholders on the other. They cannot change the nature of the controversy, nor the parties to the proceeding, by bringing a *certiorari*; they cannot involve the state into a law suit with the Morris Canal and Banking Company, to redress an injury done to them by the latter. The state has provided legal tribunals, and proper forms of action, in which its citizens may protect their rights, or redress their wrongs; but it will not consent to become the gladiator, or legal champion, of any individual.

I do not mean to say that in every case in which the state is properly plaintiff in *certiorari*, the person for whose benefit the writ is issued, must be styled defendant; nor do I understand that such was the meaning of the court in the *State v. Kirby*; neither do I suppose as Chief Justice Ewing, from what he said in the *State v. Hansford*, 6 Halst. 75, seems to have thought, that the court, in the former case, did not intend to establish a general rule, but only to decide that, in that particular case, the persons seeking to avoid the fines ought to have been made defendants in *certiorari*. On the contrary, it appears to me that the court, in *State v. Kirby*, intended to lay it down, as a general rule, that whenever the party seeking relief by the writ was the defendant, or person acted upon in the proceeding, below, and the state was the prosecutor, plaintiff; or actor, in the matter, by its appropriate agents, seeking to enforce some penalty or duty, against the individual; then the *certiorari*, whether issued at the instance of the state or citizen, is always to be entitled as between the state, plaintiff,

and the party complaining, defendant. That this is the true rule, I think there can be no doubt; it is in perfect analogy with the practice in other cases. In all indictments and criminal proceedings, the state is the original prosecuting party; yet in *certiorari*, to remove such proceedings, the state is plaintiff, and the defendant below invariably the defendant in *certiorari*. So, too, in England, *certioraries* in settlement cases, and other matters touching the poor, are entitled the King v. the party suing out the writ, and seeking to avoid or defeat the order or proceeding below; 1 Burr. R. 52. This rule may not have been uniformly followed in England; but in proceedings by or in behalf of the crown, affecting individuals by name, it will generally be found to have prevailed; as in *Rex v. Manning*, 1 Burr. R. 377, an act of parliament had authorized the surveyor of the highways to dig gravel, etc., upon lands in the occupation of Manning, upon an order of the sessions for that purpose. The *certiorari* to remove such order was entitled as above—Manning, the complaining party, being styled defendant. The case of *Rex v. King et al.*, 2 D. & E. 234, cited by Chief Justice Ewing, in the *State v. Hanford*, 6 Halst. 75, as conflicting with this rule, will not, perhaps upon examination, be found inconsistent with it. That case rather belongs to a numerous and ever occurring class of cases in which, though the state must be the plaintiff in *certiorari*, no particular individual can, with strict legal propriety, be styled, or treated, as defendant on the record. I allude to such proceedings on the part of the state, or under its authority, as affect the community in general, or the inhabitants of a particular county, or district of country—such as the Middlesex court house election case, *Coxe*, 240; the case of *Anderson*, sheriff-elect of Hunterdon county, *Coxe*, 318; the by-laws of the corporation of New Brunswick, *Coxe*, 393; the boundary question between counties, 1 Green R. 98; and to these may be added orders and proceedings of boards of assessors, and boards of freeholders, relating to taxes, county bridges, etc., and other matters of public and general nature. The court did not in the case of the *State v. Kirby*, and I do not in this case, intend to carry the rule so far as to embrace the class of cases just referred to. In them the rules ought to be entered, and all of them entitled as between the state on the one side, and the corporation, commissioners, officers or other persons, whose acts are complained of, on the other.

But the question in this case, is, whether the name of the state has properly been made use of as plaintiff in *certiorari*? I am of the opinion it has not. If the landholders have been injured at all, they have been injured by the Morris Canal & Banking Company. It is a matter of private and individual right, in which the state has no other interest but what it has in every other matter between citizen and citizen. The company are bound to pay for

the lands they take, and the damages they do, in constructing the canal. The law has constituted a tribunal to decide between the company and the landholders; the individuals composing that tribunal were to be designated upon the application of, and certain preliminary steps to be taken by, the company (see charter, 6 section, in Har. com. 95). The appointments have been made, and the persons appointed, have acted in the premises. Some of the landholders are dissatisfied, as well with the doings of the appraisers, as the manner of their appointment. What does all this present but a matter of private and individual interest and dispute? The company are responsible, as well for the regularity of the appointment of the appraisers, as for the legality of their proceedings; and I see nothing to prevent a direct appeal to this court, by *certiorari*, at the suit of the complaining party, against the Morris Canal & Banking Company, without using their name, or invoking the aid, of the state in any other way than by the command of its writ. My opinion therefore, is, that the name of the state has been unnecessarily and improperly employed in this case. If, however, this was the only objection, I would not quash the proceedings, but direct the entries in our minutes, and the indorsement on the writ to be amended, *The State v. Kirby*, 2 South. 835; *The State v. Hanford*, 6 Halst. 76. * * *

(That portion of the opinion dealing with the direction of the writ and the return, is here omitted. It will be found in § 2, *post*.)

If the controversy was to terminate with this motion, it would be unnecessary to pursue the subject any further, but as such is not likely to be the case, I shall proceed to consider the fourth exception, viz.: That the writ and return is multifarious—First, because the prosecutors have no common or joint interests, but only several, independent and distinct rights; and secondly, because the *certiorari* calls for five several and distinct records, though the prosecutors are neither parties or privies to all, or to any two or more of them.

It was asked by the counsel for the defendants how this cause is to be conducted? Are the prosecutors to join in one common assignment of errors, or is each one to assign for himself the error he complains of, as affecting his own rights? If it becomes necessary for the prosecutors to enter rules, or take depositions, to prove matters not common to them all, but applicable only to their individual cases, in what manner is it to be done? Are all to be actors for each; or, having got the different records here by a joint process, are they now to sever, and each to proceed for himself? These, and other questions must be met and answered. But it is no answer to say, as was done in argument, that separate *certioraries* would be so expensive as to amount to a denial of justice; that some of the prosecutors would be unable to bear the

expense of an individual suit. If such be the case, it is no denial of justice, in the proper and legal sense of that expression. Nor, must we amalgamate separate and individual claims, because the law abhors a multiplicity of suits. Combinations, for the purposes of litigation, are equally odious. The same argument would justify a joint action in every other case, where the plaintiffs could plead poverty, provided they had sustained similar injuries and were entitled to similar remedies. Nor is it any answer to say, that the prosecutors have one common right, if by that is meant only, that each has, in common with the others, a right to complain; and if by one common right is meant a joint right or joint cause of action, it is not true. What has A to do with B's land, or with the damages assessed to him? But, it is said, the appraisers adopted certain erroneous principles, which they applied to the cases of all. Be it so; that cannot give them a joint remedy. A was not injured by the application of that erroneous principle to the cases of B and C. If injured at all, it was by the application of that principle to his own case. Suppose several causes pending in this court, of the same character, between different parties. We mistake the law, and by the application of an erroneous principle to all the cases, we give judgment against the several defendants; will it be pretended that therefore the defendants may have a joint writ of error? Again, it is said, the landholders are all parties to the record. This, however, is not so, unless the five different records remaining in the several counties constitute in fact but one entire record. But if it were so, it would not alter the case; the landholders would, indeed, be all parties to the record, but not *a party*; each would be a party in his own right. The rights of the landholders are not joint and several. They must be either the one or the other. If joint, then all of them, without exception, ought to have united in this writ, unless permitted by a rule of this court, to sever; and if several, then they cannot, upon any principle, unite as plaintiffs or prosecutors.

The cases cited by the plaintiff's counsel *Rex v. Harmer et al.*, And. 344, & *Rex v. Inhabitants, etc.*, 2 Salk. 452, only show that one *certiorari* will remove several orders or indictments against the same individual; 4 Vin. Abr. tit. Cert. 337, let. B. 2.

Upon the best consideration I have been able to give this subject, the result in my mind is, *that where the injured or complaining party cannot, himself, upon legal principles, be the plaintiff in certiorari (as he cannot be where the state is actually, or in legal contemplation, a party to the proceedings); there the writ must be issued at the suit of the state, upon the application of the individuals seeking relief or protection; who are then the relators or prosecutors, or are defendants in certiorari, according to the nature of the case; that in all such cases, the writ may be issued at*

the instance of any one or more of any number of persons who may be affected by the proceeding below, however separate or distinct their respective rights or interests in the matter may be. The court may then reverse or set aside the order, judgment or proceeding complained of, as to any one or more of the prosecutors, or confirm the same as the law of the case may require. Accordingly we laid it down, that a writ for the removal of all indictments against A, may remove an indictment against him and twenty others, so far as concerns him; 1 Bac. Abr. tit. cert. 573, let. 1. Again, if there be but one indictment, and the offences several as if A, B, C, and D, be indicted by one bill, for severally keeping disorderly houses: A and B may have a *certiorari*, and it will remove the indictment as to them: and the record is then in B. R. virtually and truly, as to A and B; but as to C and D, the record remains below; 4 Vin. abr. tit. Cert. 337 let. B.

The State v. Wilson, assessor, etc., 1 Penn. R. 300, which was a *certiorari* to remove the assessment of taxes, the State v. Kirby, 2 South. 835, and another case of the same name in 1 Halst. 143, by which warrants for military fines against a number of delinquents were reviewed, are all in perfect accordance with these principles; for in each of those cases, the state was the actor, and necessarily the plaintiff in *certiorari*. But if the parties seeking relief, can have a *certiorari* in their own names, as plaintiffs on the record, they must prosecute it according to their rights. If more than one person is concerned, and they are jointly bound by the order or judgment below, they must all unite and prosecute a joint *certiorari* (unless by summons and severance, or rule of court in lieu thereof); and then this court must either affirm or reverse the whole matter. On the other hand, if the order or proceeding below, though it constitutes but one entire record, affects them severally and not jointly, they must then seek their remedies, by separate writs of *certiorari*. They cannot join in one writ, and then have divers trials and divers judgments in that one suit. The reason for this difference, between those cases in which the state must be plaintiff, and those in which the injured individuals may themselves be plaintiffs in *certiorari*, is this, viz.—If several persons are jointly, or jointly and severally bound by one record, and all will not, though all might unite as plaintiffs, in error, there may be summons and severance. But if it is a matter in which the state is a party and must therefore be plaintiff on the record, there can be no severance and summons among defendants; and therefore, if the state will not lend its name to such of the defendants as wish to appeal from the order or proceeding below, all would be remediless.

It was argued by the counsel for the plaintiff, that if the state creates a corporation, and gives it a right to enter upon and take

the lands of individuals, they have the right to use the name of the state, for their protection against any irregular or unlawful conduct on the part of the corporation. It is true, if a corporation abuses, or misuses its franchise, the state is the proper party to call them to account. But it by no means follows because the state, by its legislative act, has created the corporation, therefore, in every controversy between it and individuals, the state must be a party. It is no answer to say the proceeding complained of took place under the charter. A corporation can do no act but in virtue of its corporate authority; and that argument, therefore, would involve the state in every transaction between the corporation and individuals. The law cannot be so. An examination of the cases in which the state here, or the crown in England, has been plaintiff in *certiorari* against corporations, whether municipal or private, will show that the object of the *certiorari* was to call in question, either the right of the corporation to do, or the manner of doing some act affecting the public interest.

The counsel for the plaintiffs by way of preliminary objection, insisted the defendants were out of time; that they ought to have raised these questions on the rule to show cause why this writ should not be allowed. I do not think so. The only inquiries, on the argument of that rule, were, whether it was a proper case for a *certiorari*, and whether proper or sufficient grounds was laid for an allocatur. The form of the writ was not discussed or settled on that rule.

Upon the whole, for the reasons I have assigned, I am of the opinion, the *certiorari* in this case, and the return thereto, must be quashed, and set aside with costs.

FORD, J., concurred.

(Opinion of RYERSON, J., omitted.)

When there may be a joinder of parties plaintiff: see *Woodworth v. Gibbs*, 61 Iowa 398; *Richman v. Muscatine Co.*, 70 Iowa 627; *Cowing v. Ripley*, 76 Mich. 650; *Powell v. Hichner*, 32 N. J. L. 211; *Libby v. West St. Paul*, 14 Minn. 248; *People v. Rensselaer*, 11 Wend. (N. Y.) 174; *Otey v. Rogers*, 4 Ired. L. (N. Car.) 534; *People v. Cheetham*, 45 Hun (N. Y.) 6.

2. Defendants.

STATE EX REL. CLARK ET AL. V. SOUDERS ET AL., JUSTICES.

1897. COURT OF APPEALS OF MISSOURI. 69 Mo.
App. 472.

BOND, J.—Certain taxpaying citizens of Steelville, Crawford County, petition for a writ of *certiorari* directed to the justices of the county court of said county, requiring them to certify the full

proceedings of record in that court, touching the issuance of a license as dramshop keeper to one William Sorrell. The plaintiffs state that said court acted without authority of law in the premises, in that its records, do not show that said licensee is a law-abiding, taxpaying, male citizen, nor that the parties signing his application were such, nor that the bond required by law was given and approved by said court. The writ issued as prayed.

The return of two of the parties named as defendants sets up that their terms of office as members of said county expired on January 1, 1897, at which times their successors were duly qualified, hence they have no power or authority to certify the record of said court. The return of the remaining justice is accompanied by a transcript of the proceedings in question. An inspection of these does not disclose that the bond required of applicants for dramshop licenses was given and approved, nor do the proceedings themselves appear to have been approved by the county court. The defendants filed a written motion to quash the writ against them for misdirection, in that the judges of the county court of Crawford county at the time of its issuance were not made parties. Under our statutes this court is one of record and composed of three judges, a majority of whom must concur in the transaction of any official business. The court is also required to keep just and faithful records of its proceedings. R. S. 1889, §§ 3225-3416-3441. In this state the practice in proceedings for *certiorari* is governed by principles of the common law. These require the writ when not used as ancillary, to issue to the custodians of the record to be certified, that being the only subject for review. *State ex rel. v. Walbridge*, 62 Mo. App. 162; *Ward v. Board of Equalization*, 36 S. W. (Mo.) 648. *It necessarily results that the writ of certiorari cannot be directed to any ex-official after he has parted with the record sought to be brought up. In re Evingson*, 43 N. W. 733; *Kilpatrick v. Commissioners*, 42 N. J. L. 510. Hence no returns under the facts in this case can be required of the ex-members of the court. The legal control and custody of the records of the county court of Crawford county belong to the court as constituted at the time the writ in this case was applied for. The physical possession of such record by the clerk who was the mere agent of the court, did not impair the legal custody and control vested in the court itself. It has been the uniform practice in this state and elsewhere, as far as we are advised, when the judgment or order of a court or other body is attacked by *certiorari*, to direct a writ to the tribunal itself, which makes the order and controls the record. *State ex rel. Reider v. Moniteau Co., Ct.*, 45 Mo. App. 387; *State v. Schneider*, 47 Mo. App. 669. The reason for this is that it is the record of the tribunal acting judicially which must be quashed or affirmed upon the return of a writ of *certiorari*. Hence

the return must be made by the corporate body or entity exerting legal control over such record. This has been determined in an analogous case by the supreme court of Wisconsin. *State ex rel. v. Weinfurther*, 66 N. W. 702. In that case the board of county supervisors, by ordinance, undertook to attach the southern part of the town of Manitowoc to the town of Newton. Citizens of the attached territory sued out a writ of *certiorari* against the county clerk, who made a full return of the proceedings of the board. The court quashed the writ, saying: "Until the proper defendant is before the court, the court can have no jurisdiction of the subject matter. This can only be acquired by the proper writ, and a return made by the proper officer or board. The writ in this case should have been directed to the board of supervisors, and the return should have been made by the supervisors themselves or a majority of them." So in the case at bar the writ was properly issuable to the county court of Crawford county as then constituted. A court composed of several judges can only speak and act as such, through the medium of all or a majority of its members. Hence to possess this court with the record of the action of the county court, it was essential that the returns of at least a quorum of that body should have been made. The relators, however, only made one of the members of that court a party defendant (the mention of the ex-members being merely nugatory). Conceding therefore the total insufficiency of the transcript as presented by the return of a single member of the county court to show authority of record for the issuance of a dramshop license, we are precluded from so holding by the fact that the court in charge of such record has neither been made a party to this proceeding, nor has a majority of its members appeared. The result is that the writ hereinbefore issued will be quashed and the proceeding dismissed. It is so ordered. All concur.

STATE, KIRKPATRICK ET AL., PROSECUTORS, v. COMMISSIONERS OF STREETS AND SEWERS OF
NEW BRUNSWICK ET AL.

1880. SUPREME COURT OF NEW JERSEY. 42 N. J. L. 510.

THE opinion of the court was delivered by

DIXON, J.—This *certiorari* brings up an assessment made by "The Commissioners of Streets and Sewers in the City of New Brunswick." The writ was directed to, not only these commissioners, but also to "The Mayor and Common Council of the City of New Brunswick." The commissioners have made return,

but the city asks to have the writ quashed as to the municipality, on the ground that it has not custody of the record to be certified, and hence should not have been commanded to make return. This position is well taken. The act providing for the commission (Pamph. L. 1871, p. 795), empowers the commissioners to make the assessment, enter it in their books, and collect the amount or enforce the lien. The assessment remains with them for all purposes. They are also created a *quasi* corporation, with power to prosecute or defend any action or process in law or equity. They, therefore, as the legal custodians of the record, should alone have been commanded to certify it for review. *Morris Canal & Banking Co. v. State*, 2 Green 411; *State v. Howell*, 4 Zab. 519; *State v. Browning*, 4 Dutcher, 556.

When it is sought not only to reverse the proceedings of inferior tribunals, but also to assail rights acquired upon the strength of them, it is proper to bring in the persons claiming these rights, and this may conveniently (though perhaps inartistically) be done, by directing the writ to them, and serving it upon them. *Fleischauer v. West Hoboken*, 10 Vroom 421; *Seidler v. Chosen Freeholders*, 10 Vroom. 632; *State, Kiernan, pros. v. Jersey City*, 11 Vroom. 483.

But in this case, all the rights of the municipality, by force of these assessments, are legally confided to the guardianship of these commissioners.

As to the city, therefore, the writ should be quashed, with costs.

But I see no reason why this misdirection should impair the writ as to the commissioners. So far as they are concerned it is mere surplusage. * * *

See also, *Crawford v. Scio*, 22 Mich. 405; *Commonwealth v. Peters*, 3 Mass. 229; *Milwaukee Iron Co. v. Schubel*, 29 Wis. 444; *Derton v. Boyd*, 21 Ark. 264; *People v. Mayor New York*, 20 Hun (N. Y.) 73; *Ex parte Albany*, 23 Wend. (N. Y.) 277; *State v. Commissioners*, 42 N. J. L. 510; *Commonwealth v. Winthrop*, 10 Mass. 177; *Livingston v. Livingston*, 24 Ga. 379; *Wilson v. Gifford*, 41 Mich. 417; *State v. Jersey City*, 35 N. J. L. 404.

STATE EX REL. TIBBITS v. CITY OF MILWAUKEE ET AL.

1893. SUPREME COURT OF WISCONSIN. 86 Wis. 376; 57 N. W. 45.

* * * A WRIT of *certiorari* was allowed and sued out of the circuit court for Milwaukee County, on the relation of Geo. M. Tibbits, to review and reverse and set aside, for alleged illegality, certain proceedings of the common council of the city of Milwaukee, in opening, widening and extending Kane place from Prospect Avenue to Summit Avenue, in the Eighteenth ward in

said city, and confirming the report of damages for property taken for that purpose, and the assessment of benefits upon property alleged to be benefited thereby. The relator was the owner of certain lots assessed for such benefits. The writ was directed to "the City of Milwaukee and Geo. R. Mahoney, as city clerk," etc., and was superseded and vacated by the circuit court because it was not directed to the proper party. From an order to that effect, the relator appealed.

PINNEY, J.—The circuit court could not review the proceedings mentioned in the writ in this case, for the reason that it was not directed to the body or board whose acts were sought to be questioned and reviewed by it. By section 1, ch. 4, of the city charter of Milwaukee, it is provided that "the municipal government of the city shall be vested in the mayor and common council," and the common council is a continuing body (section 2, c. 4, City charter), and has the control of all its record and papers, while the city clerk has the custody thereof, and of the corporate seal, and is a mere ministerial officer, without any judicial or *quasi* judicial power. It is a general rule that the writ of *certiorari* cannot go to a mere ministerial officer, save in exceptional cases, as where the body or board whose acts are sought to be reviewed, is not a continuing one or has ceased to exist, and such ministerial officer has the custody of the record or proceeding sought to be reviewed. Such was the case of *Iron Co. v. Schubel*, 29 Wis. 444, explained in *State v. Common Council of Fon du Lac*, 42 Wis. 287, 294. The latter was a case identical with this in respect to the direction of the writ, and conclusively shows that in this case the writ should have been directed to the common council, and not to the city clerk. The fact that the writ is directed also to the city as a corporate body will not obviate the objection. The city in its corporate power has no judicial or *quasi* judicial power in the premises, and for that reason the writ should not have been directed to it. The error of directing such a writ to the corporation in street cases was noticed and held fatal in *Bogert v. Mayor*, etc., 7 Cow. 158; *In re Mt. Morris Square*, 2 Hill 14. The authorities are very numerous to the effect that where the acts of a corporate board or of corporate officers are the proper subject of review by the writ of *certiorari*, the writ must be directed to such board or officers, and not to the corporation. 5 Wait, Pr. 471; *Mechem*, Pub. Off. §§ 1001, 1007, and cases cited; *In re Mt. Morris Square*, 2 Hill 14. Where the writ has been misdirected, it may be superseded before its return, as well as after. *Ball v. Warren*, 16 How. Pr. 379; *Railroad Co. v. McCoy*, 5 How. Pr. 378; *Ferguson v. Jones*, 12 Wend. 241. And if it has been returned the court may order it quashed or vacated. *Tidd*, Pr. 403; 5 Wait. Pr. 474, 475. The circuit court properly vacated the writ. The order of the circuit court is affirmed.

STATE EX REL. OLLINGER ET AL. V. WEINFURTHER,
COUNTY CLERK ET AL.

1896. SUPREME COURT OF WISCONSIN. 92 Wis. 546; 66 N. W. 702.

THE city of Manitowoc was incorporated by an act of the legislature in 1870. It was organized of territory which was a part of the town of Manitowoc, and extends entirely across the town, so as to completely separate the town in two parts, at a distance of about two miles removed from each other, and not at any point contiguous to each other. That part of Manitowoc which lies north of the city comprises about nine full sections of land, and that south of the city comprises about $3\frac{1}{2}$ sections. About two thirds of the voters of the town live north of the city and about one third south of the city. This condition has existed ever since the incorporation of the city, until the 27th day of May, 1893, when the county board of supervisors of Manitowoc county, by an ordinance in due form, but without a written petition therefor, and without submission of the matter to a vote of the town, declared that part of the town of Manitowoc which lies south of the city to be thereby attached to and a part of the town of Newton, which was an adjoining town. On the relation of several residents of the territory so attached to the town of Newton, a writ of *certiorari*, addressed to Joseph Weinfurther, as county clerk of the county of Manitowoc, was issued out of the circuit court of Manitowoc county, and served upon the county clerk. The county clerk made what was denominated "a return," in which he certified, in effect, that the proceedings of the board were correctly set forth in the writ of *certiorari* which was returned therewith. The towns of Manitowoc and Newton and the county of Manitowoc, upon invitation of the relator's attorneys, intervened in the action, and filed various affidavits. They also moved upon the records, files and affidavits, to supersede and to quash the writ. These motions were overruled. On the 25th of April, 1895, the court rendered judgment on the merits, reversing the ordinance of the county board of supervisors. That board, up to this time, had not been a party to the action. On June 3, 1895, the district attorney of Manitowoc county appeared in the action, for the county board of supervisors of Manitowoc county, with the consent of the relators, and against the objection of the intervening towns and Manitowoc county. The appearance was for the purpose, if possible, of obviating objections to the direction of the writ and having the action finally determined. The district attorney stipulated with the attorneys for the relators to the effect that the county board of supervisors submit to the jurisdiction of the court, and adopt the return made by the county clerk as its return. The town and county of Manitowoc, only, appealed.

NEWMAN, J.—(After stating the facts.) In enacting the ordinance in question, the county board was acting in a political and governmental function, in the interests of the public, and not in the interest or for the county in its private or corporate capacity. The writ of *certiorari*, upon which it should be sought to review its action, should be directed to the officers or board whose act it was sought to review, whenever that is a permanent body, and has control of its own records. And this is true even where a clerk has custody of the records, as the mere agent of the corporation. The writ, in that case, should not be directed to the clerk, but to the board or body. If misdirected, the writ must be superseded or quashed. The court acquires no jurisdiction by it. *State v. City of Fon du Lac*, 42 Wis. 287; *State v. Milwaukee Co.*, 58 Wis. 4, 16 N. W. 25; *State v. City of Milwaukee*, 86 Wis. 376, 57 N. W. 45; *Ex parte Mayor, etc., of Albany*, 23 Wend. 277; *People v. Highway Commissioners*, 30 N. Y. 72; *Roberts v. Commissioners*, 24 Mich. 182. The writ in this case was misdirected. It should have been directed to the county board of supervisors of Manitowoc county, and not to the county clerk. The appearance of the county clerk in the action, and his attempt to make a return to the writ, was futile to give jurisdiction of the board of supervisors or of the cause. The return is a nullity, and confers no jurisdiction, either of the person or of the subject matter. *People v. Highway Commissioners, supra*. Until the proper defendant is before the court, the court can have no jurisdiction of the subject matter. This can only be acquired by a proper writ, and a return made by the proper officer or board. The writ in this case should have been directed to the board of supervisors, and the return should have been made by the supervisors themselves, or a majority of them. *Plymouth v. Plymouth Commissioners*, 16 Gray 341. Nor is a return, signed only by an attorney for the board sufficient. *Tewksbury v. Commissioners*, 117 Mass. 563; *Worcester & N. R. R. Co. v. Railroad Commissioners*, 118 Mass. 561; *Chase v. Board*, 119 Mass. 556. So neither the board of supervisors nor the subject matter, the ordinance, was before the court.

It is said to be proper, in some cases involving private rights, to join as defendants, persons having an interest adverse to the relator. However that may be, and whether it is applicable to cases involving only public right, it is difficult to see how either of the towns of Newton or Manitowoc or Manitowoc county have any interest, in their private or corporate capacity, in this matter. Residents of the territory or taxpayers, may be said to have an interest; but the corporations, as such, can have no interest. And their voluntary appearance in the action, could not, at least in the absence of interest, confer jurisdiction. Nor is it perceived how the attempted appearance of the county board of supervisors, after

judgment, aids the judgment. It was void when rendered. It was void when the county board of supervisors was represented as appearing. The court decided nothing, and changed nothing in consequence or on the strength of that appearance. It is difficult to perceive how the mere voluntary appearance by the board of supervisors, and its informal adoption of this nullity, could impart to it life and energy. This was held doubtful in *People v. Highway Commissioners*, *supra*, although the proper defendants appeared before judgment and litigated. This does not question the effect of an appearance by a natural person, in his own right, after judgment, in an ordinary action.

This case is not affected by those cases which hold that the writ should not be quashed nor the action dismissed, after a hearing on the merits. Those are none of them cases of misdirection of the writ. They were all cases where the writ had been properly issued and returned, but was liable to be quashed for irregularities. *McNamara v. Spees*, 25 Wis. 539; *Morse v. Spees*, *id.* 543; *Owens v. State*, 27 Wis. 456; *State v. Milwaukee County*, *supra*. The writ should have been quashed on the motion of the county clerk, the party served as defendant therein. The judgment of the circuit court is reversed, and the cause remanded with directions to quash the writ.

PEOPLE EX REL. PORTER ET AL. V. TOMPKINS ET AL.
ASSESSORS AND BOARD OF SUPERVISORS.

1886. SUPREME COURT OF NEW YORK. 40 Hun. (N. Y.) 228.

(A WRIT of *certiorari* was issued December 5, 1895, to the defendants to review an assessment made against relators on certain lands on Goat Island, in the Niagara River. Relators maintained that the assessment was erroneous in that at the time it must be deemed to have been made, July 1, 1885, title to said lands had passed to the state under an act condemning said lands for a state reservation.)

(So much of the opinion as relates to the validity of the assessment, is omitted.)

BRADLEY, J. * * * But in any view that may be taken of this question of title, we are unable to see how any relief can be afforded to the relators in this proceeding. The writ of *certiorari* was issued in December, 1885, directed to the assessors and board of supervisors. At that time the assessment-roll had passed from the possession and control of the assessors, and any attempt to require them to correct the roll would necessarily be ineffectual. They are by statute directed to deliver the assessment-roll to the supervisor of

their town on or before the first day of September. (1 R. S. 394, § 27.) And by their return it appears that this was done by the assessors. The writ, therefore, as to them, is not supported. (People *ex rel.* Marsh v. Delaney, 49 N. Y. 655; People *ex rel.* Law v. Commissioners, etc., 9 Hun. 609; People *ex rel.* Raplee v. Reddy, 43 Barb. 539; People *ex rel.* L. S. and M. S. R. R. Co., v. Dunkirk, 22 N. Y. W. Dig. 240; People *ex rel.* Heiser v. Assessors, 16 Hun. 407.)

But it is contended that as the writ was issued to the board of supervisors while the roll was with them, it brings it up and the court may declare the assessment illegal and order it stricken out. The office of the writ of *certiorari* is to review and correct errors committed by tribunals or officers when exercising judicial or *quasi* judicial functions. (People v. Mayor, 2 Hill 9; People *ex rel.* Oneida Valley National Bank v. Supervisors, 51 N. Y. 442; People *ex rel.* S. & U. H. R. R. Co. v. Betts, 55 *id.* 600.) When it involves the inquiry whether the action and determination were legal and should be set aside or confirmed, it may be seen that the writ may be effectual after the powers of the tribunal or officers have ceased as to the matter in question, because it is mere matter of review, but when the purpose of the proceeding is to have the direction of the court for those to whom the writ is issued, to do some act by way of correction of an error, it must, we think, be within the power of such officer or tribunal to perform the act. The writ was sent out to review the action of the assessors. They acted judicially in respect to the question of the assessment of the property, and had the power to strike out any assessment which its correction required. But the board of supervisors, after the roll went to it, could exercise only such powers as were conferred upon them by statute.

While they had some judicial duties to perform, they did not embrace the power of striking out an assessment. Amongst them is the power to equalize, by increasing or diminishing the aggregate valuations of real estate in any town, by adding or deducting a percentage of the valuations, so as to produce a just relation between all the valuations of such estates in the county, "but they shall in no instance reduce the aggregate valuations of all towns below the aggregate valuation thereof as made by the assessors." (1 R. S. 395, § 31; Bellinger v. Gray, 51 N. Y. 610.)

Our attention is called to no case in which the question arose supporting the contention that the writ in such case may effectually issue and go to the board of supervisors after the roll has come to them, or that review can be had and such relief given when the writ has been issued after the roll had legitimately passed from the assessors to the board of supervisors. In People v. Reddy, *supra*, the justice delivering the opinion remarked that "when it

appeared upon this return that the roll had been delivered to the supervisors we could have directed a writ of *certiorari* to him or to the board of supervisors, if the roll had been delivered to such board, to bring the same before us. The writ would reach the record and bring it up wherever it might be, until it had passed beyond our power to review the assessment, by delivery to the collector, with the warrant of the board of supervisors annexed." The question did not there arise, and this suggestion was *obiter*.

In *People ex rel. Bay State S. & L. Co. v. McLean*, (5 Abb. N. C. 137) the return made by the assessors to the writ was that the roll had been delivered to the supervisor, and a supplementary writ was issued to the supervisor directing him to produce the record before the court, which was done, and the court held that there was "no difficulty about striking the assessment from the roll, as that has been brought into this court by the supervisor, in whose hands it now is." This was affirmed at General Term (17 Hun. 204) and by Court of Appeals (80 N. Y. 254); but in the latter court the question was not considered further than to say that the appellants were concluded "from now raising the objection that *certiorari* was not a proper remedy, * * * assuming that, if seasonably taken, the object should have prevailed." (And see *People v. Supervisors*, 31 How. 237.) It is difficult to see how, by the writ issued to the board of supervisors, can be effectually reviewed the action of the assessors for the purpose in view.

We are inclined to think that the relators have mistaken their remedy, that the proceeding by *certiorari* cannot be supported, and that the writ must be quashed.

Writ of *certiorari* quashed, without costs.

WHISTLER v. WILSON.

1878. SUPREME COURT OF MICHIGAN. 39 Mich. 121.

PER CURIAM. Motion for further return to writ of *certiorari*. The proceedings which it is proposed to review on the writ were proceedings by a county drain commissioner, who had gone out of office when the writ issued. The writ was nevertheless directed to him, and he returns that he was out of office and no longer has custody of the papers and records.

We think this is all the commissioner could return. The proceeding is one that must stand or fall by the record, and that should be certified to us by the officer who controls it. *Commonwealth v. Winthrop*, 10 Mass. 177; *Goodrich v. Commissioners*, 1 Michigan 385.

Our attention is called to *Harris v. Whitney*, 6 How. Pr. 175, and *People v. Peabody*, 6 Abb. Pr. 228, as laying down a different doctrine. In the case last mentioned the case was a special one before a judge whose action after he went out of office would not be of record anywhere; and the case is therefore not in point here. In the case in *Howard* the proceedings seem to have been had before the judges of a court that had ceased to exist, and whether the decision is right or wrong, it can have little force as authority for it professes to overrule another decision in the same court, which seems to us the more reasonable. *Peck v. Foote*, 4 How. Pr. 425.

If the ends of justice required a personal return from the late commissioner the case might be different. But here he could return nothing but the record and that we think is to be obtained from the proper custodian.

MORRIS CANAL & BANKING COMPANY v. THE STATE.

1834. SUPREME COURT OF NEW JERSEY. 14 N. J. L. 411.

(FOR statement of facts and portions of court's opinion here omitted see same case § 1, *supra* p. 633.)

* * * * But II. Exception is taken to the direction of the writ, first because the persons to whom it is addressed are called commissioners instead of appraisers; and secondly, that it ought to have been directed to the clerks of the counties in which the lands lie, and not to the appraisers.

The first branch of this objection is not well founded. If the writ has, in fact, been directed to, and returned by, the proper persons, it is not to be defeated upon a ground so purely technical. It is true the statute speaks of the persons who are to make the appraisement as appraisers; *Har. Com.* 95, sec. 6; but I do not think it was the intention of the legislature to give them a legal cognomen, by which only they should be known in law. The term "commissioners" is a legal and appropriate designation of such persons as have commissions, letters patent, or other lawful warrant, to examine any matters, or to execute any public office, etc. 1 *Jac. Law Dict.* 507. But if a *certiorari* is directed to the right person, though by a wrong name, he alone can object, and, if in fact he makes a proper return to the writ, a third person cannot complain of the misnomer; *Daniel v. Phillips*, 4 T. R. 499.

But the second branch of this exception, viz. that the writ, or writs, ought to have been directed to the clerks of the different counties in which the lands lie, is of graver import.

When this court is called upon to exercise its superintending power over inferior and summary jurisdictions, it not infrequently becomes a question of some difficulty to know to whom its writ should be directed. In 4 Vin. Abr. 339, cert. B, 3 Pl. 5, it is said, "a *certiorari* to remove a record ought not to be made but to an officer known to have custody of the record, and upon a surmise that he hath such a record in his hand." The question then is, who, in legal contemplation, has the custody of the record, or proceedings, required to be certified in this case? To answer this question we must have recourse to the statute, under which the proceedings have been conducted; and there we find it enacted as follows: viz.: "the appraisers, or a majority of them, shall make regular entries of their determinations and appraisal, in a book or books, to be by them kept for that purpose; and shall certify the same under their hands and seals, acknowledging the same, etc., and shall cause such book or books, to be filed in the office of the clerk of the county in which the lands may be situated; there to remain a public record." Har. Com. sec. 6, 96.

Some doubt was suggested, on the argument, whether the appraisers had actually filed their proceedings in the clerk's office when the *certiorari* in this case was sued out; and it was argued that as the statute fixed no time within which the appraisers should file their proceedings, the prosecutors of this writ were not bound to know they were actually filed in the proper places and offices. The answer, however, is obvious; they sued out the writ at their peril. If they directed it to persons who had not the record, it was their own mistake; not only so, for if they sued out the writ before the commissioners filed their proceedings in the proper offices, they were premature. Until that was done, the whole matter was *in fieri*; it was incomplete and had no legal efficiency. It would be like the case of freeholders appointed to review the return of a road, who, though they had made out and signed their certificate, had not yet returned it to court. In such a case we have refused a *certiorari*; 3 Halst. R. 139. The King v. Eaton, 2 T. R. 285, was cited to show that a *certiorari* may be directed either to the person who made the document, or to him who has the custody of it. But the case is to the contrary. The justice certified a copy of the conviction, and gave as a reason for doing so, that he had, previously to the coming of the writ, sent the record itself, as it was his duty to do, to the sessions. The court refused to quash the return (which was moved for by the plaintiff in *certiorari* himself), on the ground that the writ had improperly issued. Cases were cited in our own court, to show that writs of *certiorari* have been directed to persons not having the legal custody of the document required—such, for instance, as surveyors of the highways, in road cases; and justices of the peace in the case of military warrants. But this only

proves that the same irregularity, and want of legal accuracy, has prevailed in the direction of the writ, and has been shown to exist in the relation to the parties; but it does not prove that the writ may lawfully be directed to any party or body.

Upon the supposition that the appraisers had terminated their duties, and filed their assessments in the proper offices, before the writ was issued, (and if they had not done so, the writ was premature), the writ, in my opinion was fatally misdirected. The appraisers had become *functi officio*. Their proceedings by the terms of the charter, had become matters of "public record:" they had ceased to have any control over them, and could not obey the command of our writ. They could neither send us the record itself, nor officially certify to us even a copy of it. They could, indeed, as in fact, they have done, go to the proper offices, and get copies duly certified by the respective clerks, and annex them to our writ; and the crier of the court might have done the same thing if we had directed our writ to him; but neither of them could officially respond to the writ. This is not a technical objection, as was said, but a grave and substantial one; for if a *certiorari* is improperly directed, nothing can be removed by it. 1 Bac. Abr. tit. Cert. 572, let. 1.

The III objection, is that the return is insufficient—it appearing upon the face of it, that the papers sent up are only copies.

If this objection is fatal, it only shows that the writ was misdirected. The appraisers had not the custody of the original documents, and could not, therefore, either in fact, or in legal contemplation, send them up. It is true, with some qualification, as was insisted at the bar, and said by the Chief Justice (Kirpatrick) in *State v. Nichols*, 2 South. 542, that the record is never sent with the writ, but only the tenor. But when copies are sent by the proper officer, having the legal custody of the record, they are received and taken for the record; they are not received as copies, unless the tenor only is required by the writ; 1 Bac. Abr. tit. Cert. 572, let. H. and per Holt, Ch. J. in *Rex v. North*, 2 Salk. 565, pl. 2. "It is an error in the clerks in London, that upon a *certiorari*, they return only a transcript, as if the record remained below; for in C. B. though they do not return the very individual record yet the transcript is returned as if it were the record; and so it is in judgment of law." 4 Vin. Abr. tit. Cert. 340, 341.

But this writ calls for the records; and if copies are sent, we cannot act upon them as such; we must intend them to be, and receive them as the record, or not receive them at all; for on this *certiorari* we are to hold plea of the record. But we shall make no such legal intendment in this case, for they are sent here merely as copies, and that too by persons who could not send the originals. This is not *apices litigandi*; a mere legal refinement; it is a doctrine founded on this plain legal distinction that when the

object of the *certiorari* is not to affect the record itself, or where the court awarding the writ, cannot hold plea of the record, there the tenor only is to be certified. But where the *certiorari* is in the nature of a writ of error as it is in this case, and the court is to hold plea of the record, the record itself is to be sent up; to the end, that the judgment of the court may conclude the record; 4 Vin. tit. *Cert.* 340, let. C. In my opinion therefore the return to this *certiorari* "is naught" and ought to be quashed or taken off the files. And see *Palmer et al. v. Forsyth, et al.* 4 Barn & Cres. 401; and in 10 Eng. C. L. R. 368. * * *

See also *State v. Fon du Lac*, 42 Wis. 287; *People v. Reddy*, 43 Barb. (N. Y.) 540; *State v. Howell*, 24 N. J. L. 519; *People v. Queens Co.* 1 Hill (N. Y.) 195; *Commonwealth v. Winthrop*, 10 Mass. 177; *Peck v. Foote*, 4 How. Pr. (N. Y.) 425; *Tiffany, In re*, 80 Hun (N. Y.) 486; *Evingston, In re*; 2 N. Dak. 184.

In *Harris v. Whitney*, 6 How. Pr. (N. Y.) 175, the supreme court held that a judge of the common pleas, whose office had expired, might properly make a return to the writ of *certiorari* and a similar view was announced in, *People v. Hill*, 65 Barb. (N. Y.) 170.

Section 4.—"Pleading, Practice and Procedure."

I. The pleadings.

a. Petition.

THE proceedings in *certiorari* are usually begun by filing a petition with the reviewing court. While there is considerable diversity in the statutory provisions of the respective states in the procedure as well as in the causes for which the writ will lie, the well known rules of good pleading at common law will apply here as in the case of all other extraordinary remedies. So the petition should distinctly allege all the facts required to confer jurisdiction on the reviewing court and in every respect should make out a *prima facie* case. It should clearly state the lack of jurisdiction or the errors complained of in the court below, so that an issue may be readily made up for the judgment of the reviewing court. Usually a transcript of the record below, or such parts thereof as are necessary and material, should accompany the petition.

The petition should further allege a distinct injury to the plaintiff; not so, however, where the application is made by the state. The allegations of error should be definite and specific and but one cause of action should be stated. In those states where *certiorari* serves the purpose of appeal, the petition not only sets forth the errors of law in the court below, but errors of facts as well. In such

cases a transcript of the entire evidence below is usually filed with the petition. In most of the states it is necessary, by statute, that the petition be verified; not so at common law.

b. The writ.

The writ itself is in the nature of a mandatory order of the reviewing court to the court below commanding the latter to send up, duly certified, its record and proceedings in the cause complained of. The question of proper parties and especially to whom the writ should be directed, has already been considered. The writ should be duly authenticated by the seal of the court and, when served, should be accompanied by a certified copy of the order of the court allowing the same.

Where the writ is issued to review proceedings in a criminal cause, a special clause should be inserted directing that the writ operate as a *supersedeas* and stay of further proceedings and, if necessary, a certified copy thereof should be served on the officer having the prisoner in custody.

c. The return.

The return in some respects take the place of the plea or answer is an ordinary action and is often so designated. The return then, in obedience to the order of the writ, should contain a correct statement of all the proceedings in the cause certified, together with such facts as are material and necessary to show jurisdiction in the trial court. The record of the lower court is properly a portion of the return and should be duly certified as to its correctness by the judge or clerk of the inferior court. Where the record is no longer in the possession of the party to whom the writ is directed, or for other reasons the same cannot be transmitted to the reviewing tribunal; it is a sufficient return to state such facts.

As to what shall go to make up a sufficient record, depends wholly upon the question involved and the purpose for which it is sought to use the writ. To the common law writ a complete return of a transcript of the proceedings below should be made, and this without any alteration, diminution or amendment. When a return of the record below has once been made, every presumption is entertained in favor of its correctness and conclusiveness; and this is as true of statutory tribunals and *quasi* judicial bodies or officers as of regular courts.

While a return is, strictly speaking, not subject to amendment, yet in many states this object is accomplished by supplemental returns, which are often freely allowed.

2. Procedure in obtaining the writ.

Where not changed by statute the procedure upon filing the petition is to have an *ex parte* hearing and if the petition makes out a *prima facie* case, to issue the writ.

In the absence of statutes to the contrary, no notice of filing the petition need be given the defendant, for if the writ is erroneously or improvidently issued, it may be quashed. In many states, however, either by statutes or rules of practice notice is required to be given the other party or a rule *nisi* is made upon the petition and defendant is given an opportunity of being heard before the writ itself issues. The right of notice may, of course, be waived by an appearance and going to hearing on the merits.

While no bond was required at common law, yet now in many states, especially where as in criminal cases the writ is to operate as a *supersedeas*, it is necessary that the plaintiff give a bond to indemnify the opposite party and to secure the payment of costs, before the writ will issue.

3. General matters of practice.

a. Issued in vacation or at chambers.

IN RE EIGHTH STREET, IN THE CITY OF OAKLAND,
SMITH ET AL. v. COUNCIL OF OAKLAND.

1871. SUPREME COURT OF CALIFORNIA. 40 Cal. 481.

WALLACE, J., delivered the following opinion, TEMPLE, J., concurring:

It appears by the record that in August last a petition, duly verified, was filed in the office of the clerk of this court, praying that a writ of *certiorari* be issued directed to the council of the city of Oakland, commanding them to certify to the court certain proceedings had by them in opening, lengthening and widening eighth street, etc: and thereupon the order of one of the justices of the court, the writ issued in the usual form.

Objection is now made on the part of the respondents that the writ was not issued in accordance with the requirements of law, and that the same ought to be dismissed.

The objection is based upon the proposition that a justice of this court has no authority to entertain a motion or application for this writ, as a proceeding before him in vacation, but that such a motion must always be made in open court and before the court in actual session.

The issuance of the writ of *certiorari* is an exercise of original jurisdiction by this court, and its authority to do so is derived from the provisions of the constitution.

It will be seen, by an examination of the constitution as it stood previous to the amendment of the year 1862, that the powers of the court (except in proceedings concerning the writ of *habeas corpus*) were wholly of an appellate character (Art. VI, sec. 4), and were limited to the direct exercise of appellate authority and to the issuance of "writs and process necessary to the exercise of their appellate jurisdiction."

The issuance of the writ of *certiorari* presupposed that the jurisdiction of this court to hear and determine the case in which it was issued had already fully attached, and it was only to aid and further the exercise of that jurisdiction, and not to obtain any new or additional authority over the case that the writ was directed to issue.

It will be observed, too, that not only the court, but each of the justices of the court, as contra-distinguished from the court itself, had the constitutional authority to issue the writ in aid of the exercise of the appellate jurisdiction conferred.

By the constitutional amendment of 1862 introduced a new feature and accomplished an important change in this respect. It not only extended the appellate power of this court, to subjects not heretofore embraced within its authority, but it conferred upon the court, for the first time, the power to issue writs of mandamus, *certiorari*, and prohibition, as a court of original jurisdiction, and irrespective of the circumstance that its appellate jurisdiction had or had not already attached in the particular case.

I think that it is demonstrable from a careful consideration of the language, in which this original jurisdiction is conferred, that while it was the intention that writs of *habeas corpus* might as theretofore, be issued by the court or any of the justices, all of the other enumerated writs must be issued under the direction and authority of the court itself, sitting as a court, and not by its justices as such or any of them.

The amendment is as follows: "The supreme court shall have appellate jurisdiction. * * * The court shall also have power to issue writs of mandamus, *certiorari*, prohibition and *habeas corpus*, and also all writs necessary or proper to the complete exercise of its appellate jurisdiction. Each of the justices shall have power to issue writs of *habeas corpus* to any part of the state," etc. (Art. VI, sec. 4, as amended.)

It is to be observed upon this reading, that all the appellate power is conferred upon the court, and not any of it on the justices composing it.

I think it will not be intended that the constitution intended to clothe any or all of the justices, as contradistinguished from the court itself, with appellate power over, or jurisdiction to hear or determine any case "in equity," or which involves "the title or

possession of real estate,' etc. The expression of the constitution in conferring the authority to issue writs of mandamus, *certiorari* and prohibition is not less clear in its import. "The court shall have power etc." If it had been intended that the justices of the court, as mere judicial officers, should exercise this power, that intention has certainly found no direct expression in the constitution, and any rule of construction which would deduce the power from the words employed in the instrument itself would also be potent to maintain that the general appellate power mentioned in the preceding clause of section 4, is conferred not only upon the court but upon the justices as well—for we have seen that there is nothing in the language employed, nor in the context or subject matter, which under any known rule of construction, can distinguish the one proposition from the other. This is plain of itself; but if there could be any doubt remaining upon the subject, it will be removed by looking again at the last clause of section 4, already cited. The power to issue the writ of *habeas corpus*, like that to issue the writ of mandamus, *certiorari* and prohibition, is there conferred on the court; but it is immediately afterward declared that "each of the justices shall have power to issue writs of *habeas corpus*, etc." The language of this clause makes it evident that the authors of the amendment of 1862 had in view the distinction between the court and the justices who compose it; and they understood that the power thereinbefore given to the court to issue the writ of *habeas corpus* did not, of itself, fairly import a similar authority conferred upon the justices. It is apparent, too, that when they came to confer upon the justices of the court the authority to issue the writ of *habeas corpus*, they singled out that writ from all the others with which they were then dealing, and *ex industria* omitted those others.

I am therefore of opinion that, under the provisions of the constitution, a writ of *certiorari* can be rightfully issued from the office of the clerk of this court only upon an order of the court, upon application made for that purpose, and that the twenty-fifth rule of this court, providing that the writ may be issued by the clerk upon the filing of a petition therefor, cannot be supported.

It results that the writ must be dismissed, and it is so ordered.

In accord.—*Rodman v. Austin*, 7 N. Car. 252; *People v. McDonald*, 2 Hun (N. Y.) 70; *Overseers, etc., v. Sutton*, 32 N. J. L. 295; *State v. Senft*, 2 Hill (S. Car.), 367.

The reason underlying the denial of the right to issue the writ at chambers or in vacation as expressed in a number of cases, is that the granting of the writ being a discretionary matter, such discretion is to be exercised by the whole court, after an inspection of the petition or application and not by a single judge.

In many of the states, however, either by virtue of the statute or peculiar rules of practice, the writ may be issued by a single judge at chambers or in vacation, returnable, of course, to the court *in banc*. The writ when so issued operates practically as a rule *nisi*, and if it appears upon the

return that the writ was improvidently granted or that no *prima facie* case has been made out, it will be quashed. This is the practice in Missouri and a number of other states.

b. Issued before or after final judgment below.

STATE V. SCHNEIDER ET AL.

1891. COURT OF APPEALS OF MISSOURI. 47 Mo. App. 669.

(So MUCH of the opinion as relates to the right to review contempt proceedings upon appeal or writ of error, is omitted.)

ROMBAUER, P. J.—The defendants are judges of the county court of Cape Girardeau county, who were fined by the circuit court for contempt for wilfully disobeying its orders lawfully issued. They have sued out this writ of error and assigned for error, that the order of the circuit court which they are charged with having disobeyed, was not lawfully issued, and that it appears by the record, that they were not guilty of its wilful disobedience. The plaintiff maintains the affirmative of both these propositions, and asserts in addition that the judgment in the contempt proceedings is not subject to review upon appeal or writ of error, and hence this writ should be dismissed.

* * * On the other questions presented, the following facts appear by the record,—Two applications for the issue of annual dramshop licenses were presented to the county court in August 1889. The applications were accompanied by petitions purporting to be signed by the requisite number of taxpaying citizens, but the petitions failed to state that the signers were assessed taxpayers, wherein they failed to show on their face that the signers were such as the statute required. A number of citizens appeared as objectors before the county court, and resisted the applications and approval of the petitions, both upon the ground that the petitions were insufficient upon their face, and that they were signed by persons not qualified under the statute. The county court heard the objections, sustained them in part, and overruled them in part, and approved the petitions, but took no further steps toward granting a license at the time. The order of the county court approving the petitions also failed to find that the petitions were signed by the requisite number of assessed taxpayers. The objectors thereupon applied to the circuit court for a writ of *certiorari* to remove the proceedings to that court, and upon their statement that the county court was exceeding its jurisdiction in the premises, and that the attorney general and circuit attorney declined to interfere, the circuit court issued its writ of *certiorari*, removing the cases to the circuit court.

It is not questioned but that the objectors, under the decision of this court in *State v. Heege*, 37 Mo. App. 338, had a standing in the circuit court, providing the issue of the writ was not premature. The only difference between that case and the present, touching that question, consists in the fact, that there the writ issued after the granting the license, and in the present case the writ issued before the granting of the license, but after the petition for the license was approved. The defendants claim that the circuit court had no jurisdiction to remove the proceedings from the county court before something was done therein in the nature of a final judgment or order, and that a final order in a case of this kind is the granting of the license. The defendants further claim that the order of the circuit court, embodied in the writ of *certiorari*, "to stop all further proceedings in said cause," was unwarranted by law, and was not an order, "lawfully issued" within the purview of the statute touching criminal contempts.

The papers in the two causes were transmitted to the circuit court in obedience to the writ of *certiorari*. At a subsequent term of the county court the defendants composing said court took up the two applications for license, and, although the objectors appeared and protested, defendants approved the applications and granted the licenses required, whereupon, the objectors caused them to be attached for contempt, and the circuit court rendered the judgment against them for contempt, to reverse which the defendants prosecute this writ.

The first question to be determined is whether the issue of the writ of *certiorari* by the circuit court to the county court, at the stage of the proceedings at which the writ was issued, was a proceeding warranted by law.

The writ of *certiorari*, except in cases otherwise provided by statute, is in the nature of a writ of error with this difference, that it brings up only the record of the inferior tribunal for inspection, and the trial upon it is a trial of questions jurisdictional in their nature, and not a trial *de novo* except of matters affecting the jurisdiction of the court. *Britton v. Steber*, 62 Mo. 370; *R. R. Co. v. Young*, 96 Mo. 39; *State v. Smith*, 101 Mo. 174; *State v. Police Commissioners*, 14 Mo. App. 297. At common law, when the writ was issued, not as ancillary to other process, it was a writ in the nature of a writ of error addressed to inferior tribunals whose procedure was not according to the course of the common law. 2 Wait's *Actions & Defenses*, 134. As in this state no provision is made by statute regulating proceedings upon such writs, we must assume that they are the same as at common law, and that the writ when not ancillary to other proceedings, *can issue on final judgments only*. That we understand to be the common-law rule. *Lynde v. Noble*, 2 Johns. 80; *Cuyler v. Trustees of Palmyra*, 3 Hun. 549; *Palms*

v. Campau, 11 Mich. 109; People v. County Judges, etc., 40 Cal. 479. That such is the correct view must be still more evident in view of the fact, that in this state appeal or error lies from final judgments only.

Now the approval of the petitions by the county court was in no sense a final order or judgment. It was under the statute still discretionary with the county court to issue the licenses or not, since the petitions do not purport to be signed by two-thirds of the tax-paying citizens within the town and block where the dramshops were to be kept. R. S. 1889, sec. 4572. Nor had the court passed on the applicant's bond, the approval of which is a condition precedent to granting the license, and, until the court had finally disposed of the case, proceedings therein could not be removed by *certiorari* to the circuit court or any other court either at common law or under any statute in this state. The attempt at removal was premature and unwarranted and the order contained therein to stop further proceedings was not an order lawfully issued by the circuit court within the purview of the statute on the subject of criminal contempt.

Whether the writ in a proper case will operate as a *supersedeas* without bond, is a question on which the authorities are not quite agreed; Lynde v. Noble, *supra*. The question must necessarily depend upon the nature of the proceedings sought to be affected by the writ.

As a seeming conflict exists between what is said in the opinion of this court in State v. Heege, *supra*, and in the opinion of the Kansas City Court of Appeals, in State v. Cauthorn, 40 Mo. App. 94, we deem it proper to add that in our opinion the decisions in this state go no further than to hold that the jurisdiction of inferior tribunals must appear by some part of the record of their proceedings. Jefferson Co. v. Cowan, 54 Mo. 234; Zimmerman v. Snowden, 88 Mo. 218, and that it is not essential that such jurisdiction should appear from any specified part of the record. Neither in the Heege case nor the case at bar did the jurisdiction appear by any part of the record, and as the licenses were vacated in the Heege case, so they might properly have been vacated in this, on the proper proceedings for that purpose.

It results from the foregoing that the judgment of the circuit court in fining the defendants for contempt was erroneous as a matter of law, and must be reversed. So ordered. All the judges concur.

In accord.—State v. Edwards 104 Mo. 125; Cuyler v. Trustees, etc., 3 Hun (N. Y.), 549; Lloyd v. Spurrier, 103 Iowa, 744; Everidge v. Berrys, 93 Ga. 760; Cowen v. Wildwood, 60 N. J. L. 365; State v. Valliant, 123 Mo. 524.

MOWERY v. CITY OF CAMDEN.

1886. SUPREME COURT OF NEW JERSEY. 49 N. J. L. 106; 6 Atl. 438.

DIXON, J.—The *certiorari* brings up proceedings before an alderman of the city of Camden designed to punish the prosecutrix for violation of a city ordinance passed June 12, 1884, in regard to the sale of liquor. The ordinance (section 18) authorizes any person to be proceeded against before an alderman, upon proof being made, by affidavit, of the violation of any of its provisions, whereupon the alderman is by his warrant to require the person accused to be brought before him, and is to hear and determine in a summary way the guilt or innocence of the person so charged. One of the provisions of the ordinance (section 10) is that whosoever shall sell any spirituous, vinous or malt liquors in less quantity than a quart, without having first obtained a license therefor, shall be punished by a fine of \$50, or, in default of payment, by ten days' imprisonment. Another provision (section 12) is that if any person licensed under the ordinance shall sell to a minor any spirituous, vinous or malt liquor, he shall pay a fine of \$100, or, in default of payment, be imprisoned ten days.

In the present case, the affidavit filed with the alderman, was as follows: "Camden City and County—ss.: John Wood upon his oath complains that he has good reason to believe, and does verily believe, that on March 10, 1885, at said city, one Mary Mowery did knowingly and unlawfully sell, and offer for sale spirituous liquors, vinous and malt liquors, towit, one gill of brandy, to one James Thomas, a minor under the age of twenty-one years, contrary to and in violation of" the before mentioned ordinance. On this affidavit the magistrate issued his warrant, the prosecutrix was arrested, and a day set for her hearing. Thereupon she obtained this *certiorari*.

Under our prior adjudications it is plain that this affidavit furnished no legal support to the proceedings of the magistrate. The ordinance requires as preliminary to a warrant, proof by affidavit, of some violation of its provisions, while the affidavit tendered proof only of the affiant's belief, and his opinion of its reasonableness. This was fatally insufficient, since the affidavit was to constitute a charge whereupon to base a conviction. *Robertson v. Lambertville*, 38 N. J. L. 69. Moreover if the affidavit was designed to formulate a complaint for violating the tenth section of the ordinance, it should have averred that the accused had sold, without having first obtained a license to sell, (*Greeley v. Passaic*, 42 N. J. L. 87; *Fleming v. New Brunswick*, 47 N. J. L. 231.); while if a violation of the twelfth section was in view, an averment that she had been licensed under the provisions of the ordinance was requisite, according to the words of the section. It must, indeed,

be admitted that, if the matters believed by the affiant were true, the person charged was guilty of an offense; for the sale of a gill of brandy to a minor in the city of Camden was a prohibited act. But it is not enough for a criminal complaint to aver mere guiltiness in the accused; it must allege a specific offense, so that the accused may know how to prepare his defense, if he have any, and so that the court may be able to render the legal judgment on conviction. This charge would answer neither purpose. If the accused was to be tried for violating the tenth section, proof by her of the majority of the vendee, would be of no avail, but proof of a license would be a complete defense. If she was to be tried under the twelfth section, then proof by her of a license would be of no avail, but proof of the majority of the vendee would be a complete defense. If the accused had come before the alderman, and confessed the truth of the affiant's belief, the magistrate could not have judicially decided, whether to impose the fine of \$50 under the tenth section, or the fine of \$100 under the twelfth section. If she was licensed, the latter penalty was the legal punishment; if she was unlicensed, the former penalty is the one prescribed; but whether she was licensed or not, neither the charge nor her confession would indicate. Such a complaint was fatally defective.

The insufficiency of the complaint being thus manifest, the defendant nevertheless contends that the *certiorari* was premature because allowed before conviction, and for that reason should now be dismissed. The rule on this subject is stated by Chief Justice Hornblower, in *Hinchman v. Cook*, 20 N. J. L. 272, to be that, "a *certiorari*, at the common law, goes to special and summary tribunals, and brings up the whole or any part of their proceedings, according to the command and exigency of the writ; and such writ may be issued before the inferior tribunal has consummated its authority. But a writ of error, or a *certiorari* substituted by statute for that writ, cannot go for part only of the record, nor before final judgment." The same rule was enunciated by the court of errors in *Hoxsey v. Patterson*, 39 N. J. L. 489, and is therefore settled. The theory adopted in this state, as I understand it is, that, when a *certiorari* is used as a statutory substitute for a writ of error, it cannot legally issue until after final judgment below. When the object is to remove a cause to be continued in this court, a *certiorari* in criminal matters, and a *habeas corpus cum causa* in civil matters, is the appropriate writ, although sometimes in the latter class *certiorari* has been used. *Chandler v. Monmouth Bank*, 9 N. J. L. 101. When the purpose is to review the proceedings of a special tribunal, on complaint of irregular procedure in matters legally brought within its jurisdiction, a *certiorari* may legally issue before final decision, but ordinarily should not be allowed until then, for haply the tribunal may correct its own error in time. *When the design is to reverse proceedings*

of special tribunals in matters not legally brought within their jurisdiction, then the writ of certiorari may legally and should ordinarily, be allowed when asked for, either before or after final decision, because each step in such proceedings is an unlawful vexation of the party prosecuted, against which this writ is his sole protection. The discretion of this court in the allowance and dismissal of the writ, and now also with regard to costs on final judgment, affords an adequate safeguard against any abuse.

Under the rule laid down in *Hinchman v. Cook*, and *Hoxsey v. Patterson*, *ubi supra*, the legality of the issuance of the present writ is clear. It was allowed, not as a statutory writ of error, but by the common law power of the court, to inquire into the acts of a special and summary tribunal which was proceeding against the prosecutrix upon a complaint that gave it, and could give it, no legal authority to proceed. In a proper sense, it may be said that the magistrate had not acquired legal jurisdiction over the cause. The case was only colorably, not really, under his jurisdiction. In view of the fact that the proceedings if carried on to a conviction, threatened an immediate and unlawful imprisonment of the prosecutrix, for which, however, the law, according to *Grove v. Van Duyn*, 44 N. J. L. 654, which would give her no redress I do not think discretion was improvidently exercised in allowing the writ at the threshold. Certainly no useful result can be attained by now dismissing it.

The proceedings below should be reversed, but, since no application was made to the magistrate to dismiss the complaint before suing out this writ, no costs will be awarded.

See also *Cushing v. Gay*, 23 Me. 9; *West River Bridge Co. v. Dix*, 16 Vt. 446; *Rutland v. Worcester*, 37 Mass. 71; *State v. Paterson*, 39 N. J. L. 489.

c. Verity of record.

IN RE EVINGSON.

1891. SUPREME COURT OF NORTH DAKOTA. 2 N. Dak. 184; 49 N. W. 733.

BARTHOLOMEW, J.—The facts giving rise to this case, briefly stated, are as follows:—One A. W. Kuhn was justice of the peace in Norman township, Cass County. An action was properly brought on for trial before said justice and a jury on January 3, 1890, at a point in said township agreed upon by the parties thereto, and in which the petitioner in this case was one of the defendants, resulting in a judgment against said defendants. On

March 22, 1890, the petitioner obtained from the judge of the district court of Cass County, a writ of *certiorari* to review the said judgment. In the interim the term of office of said Kuhn had expired, and his dockets had passed into the possession of his successor, one William G. Dance. The writ was directed to Justice Dance requiring him to send up a transcript of the records and proceedings in the case and all of the pleadings and papers on file in his office relating thereto. The return of this officer to the writ, showed a complete and legal judgment. Every entry which the law required should be made had been made. We do not understand that this questioned. At the end of the formal judgment and preceding the signature of the justice, were the words "Dated at Kindred, Cass County, N. D., January 3, 1890," Kindred is a village in Norman township. When this return was in, petitioner applied for and obtained a supplemental writ, directed to Ex-Justice Kuhn, requiring him to return a full statement of all his proceedings in the said action. This supplemental writ was issued upon an affidavit tending to show that the statements in the record were in fact false. When the response of Mr. Kuhn to the supplemental writ was returned, it stated that when the verdict of the jury was returned, he adjourned court, without fixing time or place of further meeting, and took his docket and went to the city of Wahpeton, in Richland county, where on January 5, 1890, the judgment was entered and signed. If the statements contained in the return of Ex-Justice Kuhn be true, he lost jurisdiction of the case when he adjourned as stated, and all his subsequent acts were without authority. Our statute—section 6104, Comp. Laws—requires the justice, when a trial is by jury, to enter judgment at once in accordance with the verdict; and by section 6109 this judgment must include the costs allowed by law to the prevailing party. These provisions are mandatory. *Hull v. Mallory*, 56 Wis. 355, 14 N. W. 374; *McNamara v. Spees*, 25 Wis. 539; *Brady v. Taber*, 29 Mich. 199. Nor could Justice Kuhn legally enter judgment or tax costs or exercise any other judicial function outside of the township and county for which he was elected. Section 6041, Comp. Laws, requires justices of the peace to keep their offices and hold their courts at some place within such county and township; and for a construction of similar provisions, see *State v. Marvin*, 26 Minn. 323, 3 N. W. 991; *Phillips v. Thralls*, 26 Kan. 780. But when the return of Ex-Justice Kuhn was received, the defendant moved the court to quash the supplemental writ and return upon the following grounds among others:—First, that the writ of *certiorari* cannot be directed to an ex-official, after he has parted with the record that is sought to be reviewed; second, that a parol return made by an ex-official is not competent to contradict the record kept by him at the time of the transactions. This attack was unsuccessful in the

district court, and the defendant brings the questions to this court by appeal.

The points above specified were well taken, and the motion should have been sustained. To sustain the position that the writ of *certiorari* may be directed to an ex-officer after he has parted with the record, respondent relies upon *Harris v. Whitney*, 6 How. Pr. 175; *Conover v. Devlin*, 15 How. Pr. 470. The cases do not go far enough. There is no allusion to the real point here. Those cases do hold that the writ may run to an ex-officer, but there is no suggestion that such ex-officer was not in each of those cases in possession of the record to be reviewed. On the contrary, in *Conover v. Devlin*, the writ directed the ex-officer "to certify to this court the proceedings had before him in this matter, and the record thereof," thus clearly showing, that such ex-officer had the record in his possession. And to support the position that the writ was properly directed the court quote the following from *Bac. Abr. "Certiorari, F."*: "If the person who ought to certify a record, as a justice of the peace who hath taken a recognizance, or a judge at *nisi prius* who hath taken a verdict, or a coroner who hath taken an inquest, die with the record in his custody, the *certiorari* may go to his executor." Certainly that authority would never be cited to show that the writ could run to one not in possession of the record. Neither can it be said from what appears in the case that the party to whom the writ was directed was not in possession of the record in *Harris v. Whitney*. There was in that case no motion to quash the return, but it was claimed that the return was a nullity on the authority of *Peck v. Foote*, 4 How. Pr. 425, where the court held that the return was an official act, and could only be made by an officer. The case of *Harris v. Whitney*, overrules the case in 4 How. Pr. and holds that the return may be made by an ex-officer,—a holding that would be generally followed to day even as to the common law writ, if such ex-officer still retained the record to be reviewed. It is true, however, that the return made by the ex-officer in *Harris v. Whitney*, was of matter not of record. So far as any report shows, there was no transcript in the return; certainly there was nothing in the return to contradict the record made below. But how far short this case falls of being an authority under our statute and in this state will become clear when we remember that the court upheld the subject matter of that return upon the theory—and expressly so state—that it is competent for an ex-officer to make his return by affidavit; and that, if such ex-officer died before return made, the case could be heard on the affidavits of by-standers, and that each party could prepare such affidavits and serve on the opposite party; thus clearly showing that in the judgment of the court, under the statute then governing them, an issue of fact might be determined by the superior

court on *certiorari*. The authorities hereinafter cited will show that such a proceeding is unknown under the common law writ. Our statute seems conclusive upon the point that the writ cannot run to an ex-officer who has parted with the record. Section 5509, Comp. Laws, reads: "The writ may be directed to an inferior court, tribunal, board, or officer, or to any other person having the custody of the records or proceedings to be certified." It is only when such "other person" has the custody of the record or proceedings that the writ can be directed to him. Again, section 5510 reads: "The writ of *certiorari* shall command the party to whom it is directed to certify fully to the court issuing the writ, at a specified time and place, and annex to the writ a transcript of the record and proceedings, describing or referring to them with convenient certainty, that the same may be reviewed by the court; and requiring the party in the meantime to desist from further proceedings in the matter to be reviewed." What does the statute mean by a transcript? Webster defines it "That which has been transcribed; a writing or composition consisting of the same words as the original; a written copy." There can be no transcript of that which never had a prior existence. How, under that statute can a matter resting purely in the memory of an ex-justice, and by him reduced to writing for the first time after the writ is served upon him, have any standing in court as a return to a writ of *certiorari*? But more, the very definition and office of the common law writ preclude its running to any one who has not possession of the record to be reviewed. In Bac. Abr. it is thus defined: "A *certiorari* is an original writ issuing out of chancery or the king's bench, directed to the judges or officers of inferior courts, commanding them to return the records of a cause depending before them, to the end that the party may have the more sure and speedy justice before him or such other justices as he shall assign to hear the cause." The substance of this definition has never been departed from, except where the statute has broadened the scope of the writ. In *Donohue v. Will Co.*, 100 Ill. 94, it is said: "It (the writ of *certiorari*) requires no return of the evidence or certificate of facts outside the record, and the trial must be had upon the record alone." Again from the same court: "The common law writ of *certiorari* simply brings before the court for inspection the record of the inferior tribunal or body, and its judgment affects the validity of the record alone,—that is determines whether it is valid or invalid." *Hyslop v. French*, 99 Ill. 171. If only the record can be returned or considered, then only the custodian of the record can make return. In *Iron Co. v. Schubel*, 29 Wis. 444, it is held that the party who has the custody of the record, and he alone, can make return to the writ. *Wood*, Mand. p. 173, thus states the rule: If it (the writ of *certiorari*) is addressed to all the per-

sons whose return is necessarily to determine the regularity or validity of the proceedings of the officer or tribunal sought to be reviewed, and the fact that the person is out of office, is no objection if he has the custody of the record." In addition on this point see, *State v. City of Fond du Lac*, 42 Wis. 287; *Crawford v. Township Board*, 22 Mich. 405; *People v. Supervisors*, 1 Hill. 195; *People v. Commissioners*, 30 N. Y. 72; *State v. Noonan*, 24 Minn. 125; *Wadsworth v. Sibley*, 38 Wis. 486; *Roberts v. Commissioners*, 24 Mich. 182; *People v. Hill*, 65 Barb. 171; *Farmington River Water Power Co. v. County Commissioners*, 112 Mass. 206; *Com. v. Winthrop*, 10 Mass. 177; *Rutland v. Commissioners*, 20 Pick. 71.

Upon the theory that the supplemental return contradicts the record entries, and to show the competency of such return for that purpose, the case of *Blair v. Hamilton*, 32 Cal. 50, is relied upon by respondent. That case is based upon *Whitney v. Board*, 14 Cal. 479, and *Lowe v. Alexander*, 15 Cal. 300. No other cases are cited. The California statute is identical with our own, so far as the scope of the writ is concerned, though their practice act gives a wider range of investigation under the writ than we have; but that is immaterial. But these cases are hardly authority for the position. In *Whitney v. Board* and *Blair v. Hamilton*, it was held that the superior court had the right to have before it the evidence on which the inferior court based the conclusion that it had jurisdiction, and that, where this evidence did not establish jurisdiction, as a matter of law, the action of the inferior tribunal could be set aside. No effort was made in either of those cases to contradict any statement of fact contained in the record by matter resting in parol. In *Lowe v. Alexander*, there was no question on *certiorari* before the court. An incidental reference was made to the holding in the *Whitney* case. The learned judge who wrote the opinion in the *Whitney* case used this language at page 500: "The provisions of our statute are merely in affirmance of the common law. The nature and effect of the writ remains unchanged. Its functions are neither enlarged or diminished, and the rules and principles which govern its operation are still the same." Our statute being identical with that of California, of course all the decisions under the common law writ, should have proper weight in this state. Many of the cases already cited announce in positive terms that the reviewing court can consider only the record made by the inferior tribunal, which is simply declaring in another form that the record cannot be contradicted. This is especially true of the cases cited from Illinois and Massachusetts. The point is emphasized that *the record cannot be contradicted, but the case must be decided upon an inspection of the record*. In *State v. Kemen*, 61 Wis. 494, 21 N. W. 530, it is said: "Upon a writ of *certiorari* nothing can be inquired into except what appears of record in the inferior court or body,

and upon the return no parol testimony is allowed to establish any issue made by the return to the allegations contained in the petition for the writ." *Weaver v. Lamman*, (Mich.) 28 N. W. 905, was *certiorari* to a justice of the peace. He made return of a transcript of the record, and also of certain matters not of record, and these matters contradicted the record. Said the court: "The judgment as it appears entered in the docket must prevail. The record of his judgment in his docket cannot be contradicted by his return to the writ." That case cannot be distinguished in principle from this case, except that the return of the extraneous matter was an official act of the justice before his term expired. *Miller v. McCullough*, 21 Ark. 426, was an attack by *certiorari* on a justice court judgment. The petition for the writ alleged that the defendant was not served with process in the proper township. The transcript sent up by the justice in obedience to the writ showed service in the proper township, but the defendant in the *certiorari* proceeding admitted in open court that service was not made in the township stated in the return. *Held, that on certiorari, the record was conclusive, even as against such admissions.* See also, *Prall v. Waldron*, 2 N. J. L. 135; *Inhabitants, etc. v. Commissioners*, 5 Allen 13; *Cassidy v. Millerick*, 52 Wis. 379, 9 N. W. 165. It is seldom that a case can be cited so entirely in point to the matter under discussion as the last case from Wisconsin. That case was *certiorari* to a justice of the peace. There had been an adjournment in the case, and it was claimed that the justice had failed prior to such adjournment, or while the parties were present, to enter in his docket any place to which said cause was adjourned, but that at some subsequent time he had added to the docket entry the following words—"At my office in the town of Poysippi. S. B. Halleck, Justice of the Peace." It was also claimed that on the adjourned day the case was not called at the office of the justice but at a town hall some miles distant. The justice was required to make a return as to these allegations and his return showed the allegations to be true; but the record certified up in obedience to the writ showed the quoted words regularly entered, in connection with the time of adjournment. The court, after a review of the authorities, say: "These decisions clearly indicate that, in reviewing a judgment of a justice court upon a common law writ of *certiorari*, the record imports verity, notwithstanding the statements of the justice to the contrary, even upon matters of jurisdiction. The cases also dispose of the question as to the place of calling the suit at the time to which it was adjourned. Upon such a writ it must be conclusively presumed that it was called at his office. To allow the return to have any effect as against the record and the presumptions arising from it, would be to authorize issues of fact as to what did or did not occur." To our minds the conclusion thus reached is un-

avoidable on principle. To permit the record to be impeached by the recollections of the justices is, in effect, contradicting the return by parol evidence; and there is such an avalanche of authority against that proceeding that no one would claim that it could be done. If the supplemental return was properly received in this case, then we are reduced to this position: When Justice Dance certified the record in obedience to the writ, had the petitioner sought to bring in Ex-Justice Kuhn, and show by his affidavit or oral testimony in open court that the statements in the record were untrue such a course would not have been tolerated for a moment. But Mr. Kuhn, a private citizen, is allowed to make an unsworn statement out of court, dignify it with the name of a return, and by the magic of that name the statement is powerful enough, to scatter a record which the same matter, coming from the same party under the solemnity of an oath, would be powerless to touch. Further, the statute makes the transcript *prima facie* evidence of all the facts therein stated. The supplemental return contradicts the transcript. The transcript is entitled to as much weight as the unsworn statement of a private citizen. Suppose the truth of that statement be questioned, how is the court to reach a decision? No evidence can be introduced to fortify or defeat either the transcript or the statement. By what instrumentality is the court to solve the dilemma? By the allowance of the supplemental return an issue of fact would be formed in a proceeding where the trial of an issue of fact is positively prohibited by law. It is true that in nearly all the states there now exists some form of statutory writ of *certiorari* broader in its scope and more flexible in its operation than the common law writ to which we are confined.

It is urged upon us, however, that the return to the supplemental writ does not in fact, contradict the record of the justice as the statute requires it to be kept; that the statute nowhere requires the justice to enter the time or place of entering judgment; and that the words, "Dated at Kindred, Cass County, N. D., January 3, 1890," not being required by statute, form no part of the record proper, and hence can be contradicted by parol. It is true that entry is not essentially enjoined. We may erase it and still the difficulty is not removed, because the facts stated in that entry are necessarily presumed from what the law does require to be made matter of record. In every case in justice court, when all the entries that the law requires to be made are made, (and there is no claim that the transcript as returned in this case does not show all the entries required by statute), the record must necessarily show a valid judgment; otherwise a judgment of a justice of the peace could not be proven by the docket or a transcript thereof. But, as we have already seen, the judgment in order to be valid must be entered at once on the return of the verdict, and the justice must

make the entry while in the proper township and county. Hence, in this case, with the quoted entry erased, we must presume from the record that the judgment was entered on January 3, 1890, in Norman township, Cass County, N. D.; otherwise we would have a judgment containing every entry that the statute requires, yet void on its face. To allow the necessary presumptions arising from a record to be contradicted by parol would be just as fatal to the record in every case as to allow the express words of the record to be contradicted. In *Cassidy v. Millerick*, *supra*, the justice stated that he called the case at the town hall, three miles from his office, but the court said: "Upon such a writ (*certiorari*) it must be conclusively presumed that it was called at his office. To allow the return to have any effect as against the record and the presumptions arising from it would be to authorize issues of fact as to what did or did not occur." The evil that would result in cases of this character from holding that the record imports verity is far less than the evil that would result from permitting court records to be frittered away by the memory of man. Nor do we think the petitioner was without remedy in this case; but that question, while important, is not controlling. It often happens that a party is without remedy except against the offending official. It was well said in *Cassidy v. Millerick*, "The question is not whether the defendant had a remedy, but was he entitled to the one he sought in this writ? For the reasons above stated the district court is directed to reverse its judgment, and quash the supplemental writ and the return thereto. All concur.

CORLISS, C. J.—I concur on the ground that the record of the cause showed that the judgment was entered at the proper time and place and that this record cannot be overthrown by the parol return. There can be no stronger presumption that an officer will make a false record than that he will make a false return. The issue between the record and the return cannot be litigated; and, as one or the other must prevail, it is consonant with sound principle to give verity to the record.

See also on verity of record.—*Cassiday v. Millerick*, 52 Wis. 379; *Schioder v. Cray*, 11 Iowa, 555; *Allen v. Stone*, 5 Barb. (N. Y.) 60; *Ringleberg v. Peterson*, 76 Mich. 107; *Scott v. Beatty*, 23 N. J. L. 256; *Hoffmann v. Superior Ct.*, 79 Cal. 475; *Pinkney v. Ayres*, 21 N. J. L. 694; *Deer v. Commissioners*, 109 Ill. 379.

d. Affirming part of judgment.

COMMONWEALTH v. WEST BOSTON BRIDGE.

1832. SUPREME JUDICIAL COURT OF MASSACHUSETTS. 30 Mass.
195.

SHAW, C. J., delivered the opinion of the court. It seems that among the papers of the late Chief Justice Parker has been found, since his decease, a manuscript opinion in this case, which has been printed in 10 Pick. 272. It was founded upon the petition for a *certiorari*, and it determines that the commissioners of highways are not authorized to lay out a highway over an existing turnpike road. But the opinion proceeds as follows: "The commissioners having acted upon this application for this new road and adjudged it to be for the common convenience to a certain extent, and made return of their proceedings, which were recorded, were *functi officio* in regard to this new road upon that application. Their further proceedings without an application are void, as a judgment of the court without a writ would be." Now my brethren upon the bench do not recollect that this point was so decided, nor was the determination of it necessary, as the proceedings of the commissioners were erroneous upon a different ground than the one upon which the cause was in fact decided. I refer to the point, rather for the purpose of saying that it is still an open question, than that it has any immediate bearing upon the present motion.

Since that opinion was given and upon the return of the writ, a question has arisen and been somewhat discussed, namely, what judgment ought to be given; whether the whole proceeding must be quashed, or whether that part of the doings of the commissioners, which lays out the new road on the turnpike, can be quashed, leaving the remainder of those proceedings in force and valid. The rule upon this subject was fully considered in the case of *Commonwealth v. Blue Hill Turnpike*, 5 Mass. R. 420. It appears to be well settled, that upon the return of a writ of *certiorari*, the court will not enter a new judgment, where the proceedings are found erroneous; but if the proceedings are so independent of, and disconnected with each other, that a part may be quashed, and leave the remainder an entire, beneficial and available judgment to the purposes for which it was intended, *the court may quash that which is erroneous, and affirm the remainder.*

In applying this rule, the question is, whether that part of the proceedings of the commissioners, which laid out the highway on the turnpike, could be quashed, and leave the remainder an entire and beneficial measure, and consistent with the general in-

tent and purpose of the commissioner. As the turnpike was already a highway, which the public had a right to use, that section of it, over which the highway was laid, so connects itself with the other parts laid out by the commissioners, that the whole may be considered as a useful highway. But on the other hand, it is manifest that it was the intent of the commissioners to make the whole a free road, and in effect to discontinue the turnpike, and the allowance of damage to the lessees of the turnpike strongly confirms this presumption. Had the whole been done by one judgment, given at one time, it would have been impossible for the court judicially to know that the commissioners would have laid out the two sections which are not on the turnpike, had they believed that there was any legal invalidity in their proceeding in regard to the intermediate section. The court could not in that case perceive that these parts were so disconnected and independent, that part could be quashed and the remainder affirmed, conformably to the principle already stated.

But it appears that, in the proceedings upon this subject, there were two distinct adjudications, and returns by the commissioners. Upon the first they proceeded to adjudicate upon the common convenience and necessity of a certain section of the highway prayed for, and to lay it out and make return of their doings to the court of sessions, reserving the determination of the other part, for future consideration. Afterwards a further adjudication and return were made, in regard to the other section. It was in the latter proceeding that the commissioners exceeded their authority, in laying the highway upon the turnpike. These two proceedings and adjudications are wholly distinct and independent of each other, and the validity of the former can in no way be affected by the irregularity in the latter. Had no second adjudication ever taken place, the first is complete and would have remained so. The consequence therefore is, and this is the judgment of the court, that all that part of the judgment and proceedings of the commissioners embraced in their second return to the court of sessions, be quashed, and held to be void and of no effect, and all that part of their proceedings embraced in their first return, be affirmed.

See also *Baker v. Superior Court*, 71 Cal. 583; *Shafer v. Hogue*, 70 Wis. 392; *Walker v. McDonald*, 5 Minn. 455; *Hotchkiss v. Chevaillier*, 12 Tex. 224; *Kast v. Kathern*, 3 Denio (N. Y.), 344; *Childs v. Crawford*, 8 Ala. 731.

e. Costs.

BALDWIN v. WHEATON.

1834. SUPREME COURT OF NEW YORK. 12 Wendall 263.

ON a motion to this cause relative to costs, the chief justice ruled, that in the prosecution and defence of a common law *certiorari*, neither party is entitled to recover costs against the other.

In New York now, and in other states, it is held that costs may be awarded in *certiorari* in the appellate tribunal. *People v. Van Alstyne*, 3 Keyes (N. Y.), 35; *People v. Commissioners, etc.*, 27 How. Pr. (N. Y.) 158; *Myers v. Pownal*, 16 Vt. 426; *Stetson v. Penobscot Company*, 72 Me. 17.

CHAPTER V.

PROCEDENDO.

1. The Common Law Writ.

“ * * * A writ of *procedendo ad iudicium* issues out of the court of chancery, where judges of any subordinate court do delay the parties; for that they will not give judgment either on the one side or the other, when they ought so to do. In this case a writ of *procedendo* shall be awarded, commanding them in the king's name to proceed to judgment; *but without specifying any particular judgment*, for that (if erroneous) may be set aside in the course of appeal; or by writ of error or false judgment; and upon further neglect or refusal, the judges of the inferior court may be punished for their contempt by a writ of attachment returnable to the king's bench of common pleas.” 3 Blackstone, Com. 109, 110. See also Fitzherbert's *Natura Brevium*, 359.

But few cases can be found in the old reports in which this writ has been issued. Whether because of a better acquaintance with mandamus or because of the technical difficulties involved in suing out a *procedendo*, the latter writ, in the sense in which Fitzherbert and Blackstone define it, seems to have fallen early into disuse and mandamus to have been employed to meet the ends for which it was originally designed. In modern practice the writ of *procedendo*, in the above defined sense, is seldom, if ever used. Certainly the writer has been unable to find any case in our American reports in which the writ of *procedendo* has been used to compel a court to proceed to judgment.

THE TOWN OF WOODSTOCK v. GALLUP.

1856. SUPREME COURT OF VERMONT. 28 Vt. 587.

(CERTIORARI to the county court to correct the judgment of said court setting aside the action of selectmen of the county in laying out a certain highway and declaring that it, the said county court, had no authority in law to establish a highway, and refusing to entertain further proceedings in said cause.)

(So much of the opinion as relates to the authority of the county court to establish public highways, is omitted.)

The opinion of the court was delivered by REDFIELD, Ch. J.

* * * It seems to us that the more appropriate remedy in cases like the present, where the inferior court disposes of the matters upon some incidental questions, and declines to hear the case upon its merits, is a writ of mandamus, in the nature of a *procedendo*, as was held by the Supreme Court of the United States in *Livingston v. Dorgenois*, 7 Cranch 577, 2 C. D. 677; and as was virtually done in *Ex parte Crane*, 5 Pet. 190, where a mandamus was issued to a judge of the circuit court in the district of New York, requiring him to sign a bill of exceptions. The writ of mandamus is the supplementary remedy, so to speak, where the party has a clear right, and no other appropriate redress, to prevent a failure of justice; 3 Black. Com. 110, 12 Pet. Abr. 309 (438). It is the absence of a specific legal remedy which gives the court jurisdiction; 2 Sel. N. P. Title "Mandamus." But the party must have a specific legal right; *Rex v. Barker*, 3 Burrow 1265; *Ellenborough*, Ch. J., 8 East 219. The remedy extends to the control of all inferior tribunals, corporations, public officers, and even private persons in some cases; but more generally the English Court of King's Bench declines to interfere, by mandamus, to require a specific performance of a contract, where no public right is concerned. Lord Mansfield in *King v. Barker*, 3 Bur. 1265-1270; *Angell & Ames on Corporations*, 761; *The King v. The Mayor of Colchester*, 2 Term. 260; *The King v. The Corporation of Bedford Level*, 6 East 356. There is almost no end to the cases on this subject. They will be found digested, under the title "Mandamus" in *Petersdorff's Ab.* and *Bacon's Ab.*

The procedendo seems to be only a particular form of the mandamus, and often to accompany the *certiorari*, and indeed always perhaps, where the case is remanded for further proceedings in the inferior court. So that in the present case, if the *certiorari* had issued, and the record had been actually brought into this court, all we could have done, would have been to reverse the judgment of the county court, and either hear it in this court, upon the merits, or remit it to the county court, with a writ of mandamus, in the nature of a *procedendo* to hear the case and determine it upon its merits; 14 Petersd. Ab. 32, (43); Black. Com. 109.

The *procedendo* is always accorded where the case is more proper to be tried in the inferior court; *Pope v. Vaux & Wife*, 2 W. Black. 1060; But the mandamus and *procedendo* is not to require the inferior court to render any particular judgment, but to proceed and give judgment, notwithstanding some alleged ex-

cuse. *Ex parte Hoyt*, 13 Pet. 279. Nor will a mandamus be accorded where the party has an appeal to the same court where the mandamus is asked. *Ex parte Whitney*, 13 Pet. 404. And in this case we prefer this mode of redress to that of *certiorari*, only because we can, in this mode, accomplish all that is desired, without bringing the case here before it is finished in the inferior court.

The case of *Walker v. The London and Blackwall Railroad Company*, 3 Q. B. 744, is a case almost precisely in point. The sheriff was required to hold inquisitions upon petitions for land damages against railways. Upon the trial of the plaintiff's case, the sheriff directed the jury to find a verdict for the defendants, on the ground that the plaintiff was not entitled to compel the company to purchase his property. The Queen's Bench, on an application for a peremptory mandamus, decided that the writ must issue, requiring the sheriff to proceed and assess the damages disregarding his former judgment and the verdict of the jury. The form of the writ there issued was a mandamus in the nature of a *proccedendo* as in the present case. But very likely the same thing might be done only by mandamus, in regard to those tribunals to which the superior court had power to issue the writ of *certiorari*. For if that were taken away by statute, it would be regarded as an evasion to accomplish the same thing, more directly, by a mandamus; *Rex v. Justices of Yorkshire*, 1 Adol. & El. 563; see *In re Edmunson*, 24 Eng. Law & Eq. Rep. 169.

The petitioners having amended the prayer of the petition, by adding thereto "or mandamus or other appropriate remedy in the discretion of the court," the order is made.

That a writ of mandamus in the nature of a *procedendo* do issue to the county court, in the county of Windsor, requiring them to proceed and hear, try and determine the case there pending between the parties aforesaid as described in the petition to this court, upon its merits, and render judgment thereon wholly disregarding their former judgment given in the case and complained of in the petition here pending, and that no costs, in this court be taxed in favor of either party.

STATE EX REL. MARTIN v. H. L. LAZARUS, JUDGE.

1885. SUPREME COURT OF LOUISIANA. 37 La. Ann. 610.

THE opinion of the court was delivered by

BERMUDEZ, C. J.—This is an application for a mandamus to cocerse the decision of a cause on its merits.

The complaint is that, though the case was tried, argued and submitted two years ago and although the district judge has been often requested and has frequently promised to pass upon the same, no decision has, as yet, been rendered, and that the delay thus occasioned amounts to a refusal to determine the controversy, and that this is a denial of justice.

The relator avers that although the facts involved may be numerous and complicated, yet the questions of law presented are few and simple; that the parties have, with a view to assist the judge in his examination and determination of the matters presented, in the year 1883 and in the beginning of 1884, submitted elaborate printed briefs containing references to the most important portions of the testimony.

He urges that he is seventy-seven years of age and fears that death will overtake him, before the cause is decided, if the future may be judged by the past; that his death may seriously affect the vigorous prosecution of the cause and that he believes that it is important to his interests that the same be promptly decided.

The district judge, in an elaborate return, represents the case as one of great complication and difficulty, requiring unusual consideration for determination. He says that the suit was brought in 1874, that it passed from one court to another, by operation of law; that the accounts involved were referred for consideration and report to experts and to an umpire; that the parties litigant disagreed; that the record is immense and the whole responsibility of determining the issues presented rests on him; that the cause was not actually submitted until November, 1884; since when he has diligently applied himself to the examination and study of the accounts, testimony and reports in the case; that there are grave and important legal propositions involved which counsel for the plaintiff did not discuss and in which they have, in no manner, aided the court by reference to authorities; that he has used every effort and made every endeavor to reach a prompt decision in the cause; that he was in the active preparation of his opinion in the case; and, now without stating within what time specifically the cause is to be decided, respondent informs this court that a decision will be rendered before the close of the present term, which means July 3d, next.

The district judge charges that the statements in the relator's petition that the delay operates as a denial of justice is malicious, false and untrue and that whatever delay is incident to a prompt decision of this cause, results from the plaintiff's action.

The case is strongly presented by both the relator and the respondent; but there can be no doubt that, under the law and under the showing of the district judge, the complaint is not without just foundation.

The right of this court, in a proper case to issue this writ, cannot be questioned.

The code of practice is explicit to the effect, that, the writ issues when the judges of inferior courts are guilty of a denial of justice, "or of unreasonable delay in pronouncing judgment on causes before them." C. P. 838.

Up to recently it was not so easy to determine what the code meant by "unreasonable delay," but the last legislature appears to have construed it to signify thirty days. V. Act 72, p. 94 of 1884.

Whatever be the standpoint from which, either article C. P. 838, or the act of 1884 or both, be considered, it is clear that the district judge has had more than ample time to investigate the case and to render a conscientious judgment in it.

From the return made, it appears that the cause was submitted in November, 1884, if not before, that is, upwards of five months, or a period exceeding four times the delay within which the act of 1884 designs cases to be determined.

It is apparent that, had this cause been tried and argued before and submitted to a special jury two years ago, when the oral argument in it was closed, it would, long ago, have been disposed of.

The relator has presented a clear *bona fide* case in point of fact, in which it appears that the respondent has failed to comply with a duty unequivocally imposed upon him by law.

Under the circumstances we are allowed no discretion, and must allow the relief sought.

It is, therefore, ordered and decreed, that the alternative mandamus issued be made peremptory and that the respondent be commanded to decide the cause, described in the petition without further delay.

(Concurring opinion of POCHE, J., and dissenting opinion of FENNER, J., omitted.)

MANNING, J.—Our mandate to the respondent judge to decide without further delay, the cause wherein the relator is plaintiff and R. P. Aldige and Jules Alidge are defendants having been sent down and not having been obeyed, the relator has moved that the judge show cause why an order of arrest and imprisonment should not issue thereon.

The judge answering disclaims that his non-decision of the cause is due to contempt of the authority of the court or to any desire to disobey or evade its mandate, and avers that he construed it to mean that he should examine the cause with all possible diligence and decide it according to the law and the evidence. He states that he has been "faithfully engaged in the preparation of his opinion every spare moment of his time for a long period prior to the application for a mandamus and that as soon as he can finish

his opinion, which will probably be in the course of the following week, he will render judgment as required in the mandate." If however he has misconstrued our mandate he begs that we will inform him what judgment to render.

It is beyond our province to instruct or our power to command what judgment shall be rendered in the suit at the present stage. We can only order him to proceed to judgment. We have done that, and the code of practice directs "if he does not obey, an order of arrest shall issue and he shall be imprisoned until he shall render obedience." Art. 843.

The terms of the article imply that all the reasons of the judge for his non-decision of the cause shall have been heard and passed on when the mandamus was made peremptory, for the language is imperative "if his answer is considered insufficient, then a peremptory mandate shall issue" and the penalty of his disobedience shall be arrest and imprisonment.

Therefore the reasons now given for disobedience are merely those given or which should have been given why our peremptory mandate should not issue. The matter is closed and our decree entered thereon was unambiguous and not difficult to be construed.

The application for the mandamus was made on the fifth of the present month. It is now the twenty-ninth and this term of the court must end tomorrow. We had hoped that as the respondent had been preparing his opinion long before the application for the writ was made, we should have had the satisfaction of knowing that its completion and the rendition of a judgment in the cause had relieved us of performing a disagreeable duty.

The law has given the relator the remedy now invoked by him and it has very distinctly and directly imposed on us the obligation of applying it. We have nothing to do with its reasonableness or unreasonableness.

Since however the respondent informs us that he will probably be ready to decide the cause within the next week, we shall suspend the execution of the order for imprisonment for one week from this day.

It is therefore ordered and decreed that the respondent Henry L. Lazarus be arrested and imprisoned in the jail of this parish until he has obeyed the mandate of this court heretofore issued to him in the proceedings for a mandamus in this cause. And it is further ordered that the execution of this decree is suspended for one week from this day, that is to say this suspension expires on Friday, the fifth day of June next.

See also *Life & Fire Insurance Co. v. Adams*, 9 Pet. (U. S.) 572; *State v. Young*, 31 Fla. 594; *Trapnall, Ex parte*, 6 Ark. 9; *Ex parte State Bar Asso.*, 92 Ala. 113; *People v. Sexton*, 24 Cal. 84; *State v. St. Louis School Board*, 131 Mo. 505; *State v. Smith*, 69 Ohio St. 196; *People v. Foster*, 40 Misc. (N. Y.) 19.

2. The common use of the term "*procedendo*" in modern practice.

In modern practice the term "*procedendo*" is commonly used to designate the mandate of the appellate tribunal when it remands a case before it to the court below, either with or without instructions to proceed in conformity with the opinion or judgment of said appellate court. In this sense the term is used synonymously with the terms "*remittur*" and "mandate."

The necessity for some such writ or order arises from the fact that without some form of authority the court below can entertain no proceedings in a cause which has been appealed or is before the higher tribunal by writ of error, *certiorari*, prohibition or some other writ.

In some states the order of an appellate court dismissing an appeal or quashing some other writ by which the cause below has been brought before it, is held to be sufficient authority for the trial court to proceed in the cause and no official *procedendo* or *remittur* is necessary.

CHAPTER VI.

HABEAS CORPUS.

Section 1.—Definition and General Principles Governing the Writ.

1. Definition, origin and history of the writ.

"No freeman shall be taken, or imprisoned, or be disseized of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any other wise destroyed; nor will we pass upon him nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right." Magna Carta, 9 Hen. III (1225) Cap. 29; 1 Eng. Stat. at Large, 7.

"The writ of *habeas corpus*, the most celebrated writ in the English law. Of this there are various kinds made use of by the courts at Westminster, for removing prisoners from one court into another for the more easy administration of justice. Such is the *habeas corpus ad respondendum*, when a man hath a cause of action against one who is confined by the process of an inferior court; in order to remove the prisoner, and charge him with this new action in the court above. Such is that *ad satisfaciendum* when a prisoner hath had judgment against him in an action, and the plaintiff is desirous to bring him up to some superior court to charge him with execution. Such also are those *ad prosquendum, testificandum, deliberandum*, etc.; which issue when it is necessary to remove a prisoner, in order to prosecute or bear testimony in any court, or be tried in the proper jurisdiction wherein the fact was committed. Such is, lastly, the common writ of *ad faciendum et recipiendum*, which issues out of any of the courts at Westminster Hall, when a person is sued in some inferior jurisdiction, and is desirous to remove the action into some superior court; commanding the inferior judges to produce the body of the defendant, together with the day and cause of his caption and detainer (whence the writ is frequently denominated an *habeas corpus cum causa*), to do and receive whatsoever the king's court shall consider in that behalf. This is a writ grantable of common right, without any motion in court, and it instantly supersedes all proceedings in the court below. But in order to prevent the surreptitious discharge of prisoners, it is ordered by statute 1 & 2 P. & M. c. 13, that no *habeas corpus* shall issue to remove any

prisoner out of any gaol, unless signed by some judge of the court out of which it is awarded. And to avoid vexatious delays by removal of frivolous causes, it is enacted by statute 21 Jac. I, c. 23, that, where the judge of an inferior court of record is a barrister of three years' standing, no cause shall be removed from thence by *habeas corpus* or other writ, after issue or demurrer deliberately joined; that no cause if once remanded to the inferior court by writ of *procedendo* or otherwise, shall ever afterwards be again removed; and that no cause shall be removed at all if the debt or damages laid in the declaration do not amount to the sum of five pounds. But an expedient having been found out to elude the latter branch of the statute, by procuring a nominal plaintiff to bring an action, for five pounds or upwards (and then, by the course of the court, the *habeas corpus* removed both actions together), it is therefore enacted by statute 12 Geo. I, c. 29, that the inferior court may proceed in such actions as are under the value of five pounds, notwithstanding other actions may be brought against the same defendant to a greater amount. And by statute of 19 Geo. III, c. 70, no cause under the value of ten pounds shall be removed by *habeas corpus*; or otherwise, into any superior court, unless the defendant so removing the same shall give special bail for payment of the debt and costs.

But the great and efficacious writ, in all manner of legal confinement, is that of *habeas corpus ad subjiciendum*; directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his caption, and detention, *ad faciendum, subjiciendum, et recipiendum*, to do, submit to, and receive whatsoever, the court or judge awarding such writ shall consider in that behalf. This is a high prerogative writ, and therefore by the common law issuing out of the court of king's bench, not only in term time but also during the vacation, by a *fiat* from the chief justice or any other of the judges, and running into all parts of the king's dominions; for the king is at all times entitled to have an account why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted. If it issues in vacation, it is usually returnable before the judge himself who awarded it, and he proceeds by himself thereon; unless the term shall intervene and then it may be returned in court. Indeed if the party were privileged in the court of common pleas and exchequer, as being (or supposed to be), an officer or suitor of the court, an *habeas corpus ad subjiciendum* might also by common law have been awarded from thence; and if the cause of imprisonment were palpably illegal, they might have discharged him; but, if he were committed for any criminal matter, they could only have remanded him, or taken bail for his appearance in the court of

king's bench, which occasioned the common pleas for some time to discountenance such applications. But since the mention of the king's bench and common pleas, as co-ordinate in this jurisdiction, by statute 16 Car. 1, c. 10, it hath been holden, that every subject of the kingdom is equally entitled to the benefit of the common law writ, in either of those courts, at his option. It hath also been said and by very respectable authorities, that the like *habeas corpus* may issue out of the court of chancery in vacation; but upon the famous application to Lord Nottingham by Jenks, notwithstanding the most diligent searches, no precedent could be found where the chancellor had issued such a writ in vacation; and therefore his lordship refused it.

In the king's bench and common pleas it is necessary to apply for it by motion to the court, as in the case of all other prerogative writs (*certiorari*, prohibition, mandamus, etc.,) which do not issue as of mere course, without showing some probable cause why the extraordinary power of the crown is called in to the party's assistance. For, as was argued by Lord Chief Justice Vaughan (*Bushel's Case*, 2 Jon. 13), "it is granted on motion, because it cannot be had of course, and there is therefore no necessity to grant it; for the court ought to be satisfied that the party hath a probable cause to be delivered." And this seems the more reasonable because (when once granted) the person to whom it is directed can return no satisfactory excuse for not bringing up the body of the prisoner. So that if it is issued of mere course, without showing to the court or judge some reasonable ground for awarding it, a traitor or felon under sentence of death, a soldier or mariner in the king's service, a wife, a child, a relation or a domestic confined for insanity, or other prudential reasons, might obtain a temporary enlargement by suing out a *habeas corpus*, though sure to be remanded as soon as brought up to the court. And therefore Sir Edward Coke, when chief justice, did not scruple in 13 Jac. 1, to deny a *habeas corpus* to one confined by the court of admiralty for piracy; there appearing upon his showing, sufficient grounds to confine him. On the other hand, if a probable ground be shown that the party is imprisoned without just cause, and therefore hath a right to be delivered, the writ of *habeas corpus* is then a writ of right, which "may not be denied, but ought to be granted to every man that is committed or detained in prison or otherwise restrained, though it be by command of the king, the privy council or any other."

"In a former part of these commentaries we expatiated at large on the personal liberty of the subject. This was shown to be a natural inherent right, which could not be surrendered or forfeited, unless by the commission of some great and atrocious crime, and which ought not to be abridged in any case without the special

permission of law. A doctrine coeval with the first rudiments of the English constitution, and handed down to us from our Saxon ancestors, notwithstanding all their struggles with the Danes and the violence of the Norman conquest; asserted afterwards and confirmed by the Conqueror himself, and his descendents; and though sometimes a little impaired by the ferocity of the times, and the occasional despotism of jealous or usurping princes, yet established on the firmest basis by the provisions of *magna carta*, and a long succession of statutes enacted under Edward III. To assert an absolute exemption from imprisonment in all cases is inconsistent with every idea of law and political society; and in the end would destroy all civil liberty by rendering its protection impossible; but the glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree, the imprisonment of the subject may be lawful. This it is which induces the absolute necessity of expressing upon every commitment the reason for which it is made; that the court upon a *habeas corpus* may examine into its validity, and according to the circumstances of the case, may discharge, admit to bail, or remand the prisoner.

And yet, early in the reign of Charles I, the court of king's bench, relying on some arbitrary precedents (and those perhaps misunderstood), determined that they could not upon a *habeas corpus* either bail or deliver a prisoner, though committed without any cause assigned, in case he was committed by the special command of the king, or by the lords of the privy council. This drew on a parliamentary inquiry, and produced the Petition of Right, 3 Car. I, which recites this illegal judgment, and enacts that hereafter no freeman shall be so imprisoned or detained. But when, in the following year, Mr. Selden and others were committed by the lords of the council, in pursuance of his majesty's special command, under a general charge of "notable contempts and stirring up sedition against the king and government," the judges delayed for two terms (including also the long vacation) to deliver an opinion how far such a charge was bailable. And when at length they agreed that it was, they, however, annexed a condition of finding sureties for the good behavior, which still protracted their imprisonment, the chief justice, Sir Nicholas Hyde, at the same time declaring that "if they were again remanded for that cause perhaps the court would not afterwards grant a *habeas corpus*, being already made acquainted with the cause of the imprisonment." But this was heard with indignation and astonishment by every lawyer present; according to Mr. Selden's own account of the matter, whose resentment was not cooled at the distance of four and twenty years."

"These pitiful evasions give rise to the statute 16 Car. I, c. 10,

§ 8, whereby it is enacted that if any person be committed by the king himself in person, or by his privy council, or by any of the members thereof, he shall have granted unto him, and without any delay upon any pretense whatsoever, a writ of *habeas corpus*, upon demand or motion made to the court of king's bench or common pleas; who shall thereupon, *within three court-days after the return is made*, examine and determine the legality of such commitment, and do what to justice shall appertain, in delivering bailing, or remanding such prisoner. Yet, still in the case of Jenks, before alluded to, who in 1676 was committed by the king in council, for a turbulent speech at Guildhall, new shifts and devices were made use of to prevent his enlargement by law, the chief justice (as well as the chancellor) declining to award the writ of *habeas corpus ad subjiciendum* in vacation, though at last he thought proper to award the usual writs *ad deliberandum*, *etc.*, whereby the prisoner was discharged at the Old Bailey. Other abuses had also crept into daily practice, which had in some measure defeated the benefit of this great constitutional remedy. The party imprisoning was at liberty to delay his obedience to the first writ, and might wait until a second and a third, called an *alias* and a *pluries*, were issued, before he produced the party, and many other vexatious shifts were practiced to detain state prisoners in custody. But whoever will attentively consider the English history may observe that the flagrant abuse of any power by the crown or its ministers has always been productive of a struggle which either discovers the exercise of that power to be contrary to law, or (if legal) restrains it for the future. This was the case in the present instance. The oppression of an obscure individual gave birth to the famous *Habeas Corpus* Act, 31 Car. II, c. 2, which is frequently considered as another *Magna Carta* of the kingdom; and by consequence and analogy has also in subsequent times reduced the general method of proceedings on these writs (though not within the reach of the statute, but issuing merely at the common law) to the true standard of law and liberty."

"The statute itself enacts, 1. That on complaint and request in writing by or on behalf of any person committed and charged with any crime (unless committed for treason or felony expressed in the warrant; or as accessory, or on suspicion of being accessory, before the fact, to any petit treason or felony; or upon suspicion of such petit treason or felony, plainly expressed in the warrant; or unless he is convicted or charged in execution by legal process), the lord chancellor or any of the twelve judges, in vacation, upon viewing a copy of the warrant, or affidavit that a copy is denied, shall (unless the party has neglected for two terms to apply to any court for his enlargement) award a *habeas corpus* for such prisoner, returnable immediately before himself or any

other of the judges; and upon the return made shall discharge the party, if bailable, upon giving security to appear and answer to the accusation in the proper court of judicature. 2. That such writs shall be endorsed as granted in pursuance of this act, and signed by the person awarding them. 3. That the writ shall be returned and the prisoner brought up within a limited time, according to the distance not exceeding in any case twenty days. 4. That officers and keepers neglecting to make due returns, or not delivering to the prisoner or his agent within six hours after demand a copy of the warrant of commitment, or shifting the custody of a prisoner from one to another without sufficient reason or authority (specified in the act), shall for the first offense, forfeit £100 and for the second offense £200 to the party grieved, and he be disabled to hold office. 5. That no person, once delivered by *habeas corpus* shall be recommitted for the same offense, on penalty of £500. 6. That every person committed for treason or felony shall, if he requires it, the first week of the next term, or the first day of the next session of oyer and terminer, be indicted in that term or session or else admitted to bail; unless the king's witnesses cannot be produced at that time; and if acquitted or if not indicted and tried in the second term or session, he shall be discharged from his imprisonment for such imputed offense; but that no person, after the assizes shall be open for the county in which he is detained, shall be removed by *habeas corpus* till after the assizes are ended, but shall be left to the justice of the judges of assize. 7. That any such prisoner may move for and obtain his *habeas corpus* as well out of the chancery or exchequer as out of the king's bench or common pleas; and the lord chancellor or judges denying the same, on sight of the warrant or oath that the same is refused, forfeit severally to the person grieved the sum of 500 pounds. 8. That this writ of *habeas corpus* shall run into the counties palatine, cinque ports, and other privileged places, and the islands of Jersey and Guernsey. 9. That no inhabitant of England (except persons contracting, or convicts praying, to be transported or having committed some capital offence in the place to which they are sent) shall be sent prisoner to Scotland, Ireland, Jersey, Guernsey, or any places beyond the seas, within or without the king's dominions, on pain that the party committing, his advisers, aiders and assistants, shall forfeit to the party aggrieved a sum not less than 500 pounds, to be recovered with treble costs; shall be disabled to bear any office of trust or profit; shall incur the penalties of *praemunire*, and shall be incapable of the king's pardon."

"This is the substance of that great and important statute; which extends (we may observe) only to the case of commitments for such criminal charge, as can produce no inconvenience to public

justice, by a temporary enlargement of the prisoner; all other cases of unjust imprisonment being left to the *habeas corpus* at common law. But even upon writs at the common law it is now expected by the court, agreeable to ancient precedents and the spirit of the act of parliament, that the writ should be immediately obeyed, without waiting for an *alias* or a *pluries*; otherwise an attachment will issue. By which admirable regulations, judicial as well as parliamentary, the remedy is now complete for removing the injury of unjust and illegal confinement. A remedy the more necessary, because the oppression does not always arise from the ill-nature, but sometimes from the mere inattention of government. For it frequently happens in foreign countries (and has happened in England during temporary suspensions of the statute) that persons apprehended upon suspicion have suffered a long imprisonment, merely because they were forgotten."

"The satisfactory remedy for the injury of false imprisonment, is by action of trespass *vi et armis*, usually called an action of false imprisonment; which is generally and almost unavoidably accompanied with a charge of assault and battery also; and therein the party shall recover damages for the injury he has received; and also the defendant is, as for all other injuries committed with force, or *vi et armis*, liable to pay a fine to the king for violation of the public peace." 3 Blackstone's Commentaries, 130 ff.

"* * * The date of its origin cannot now be ascertained. Traces of its existence are found in the Year Books (48 Edw. 111, 22;) and it appears to have been familiar to, and well understood by, the judges in the reign of Henry VI. In its early history it appears to have been used as a means of relief from private restraint. The earliest precedents where it was used against the crown are in the reign of Henry VII. Afterwards its use became more frequent, and in the reign of Charles I it was held an admitted constitutional remedy; Hurd, Hab. Cor. 145; Church, Hab. Cor. 3. In writing of procedure in the thirteenth century, the recent work which throws so much new light upon the early history of the English law, says: "Those famous words '*habeas corpus*' are making their way into divers writs, but for any habitual use of them for the purpose of investigating the cause of imprisonment we must wait until a later time." There is also a reference to what is termed the use of *habeas corpus* at "one time a part of the ordinary mesne process in a personal action," also referred to as the "Bractonian process which inserts a *habeas corpus* between attachment and a distress," which (*habeas corpus*) a little later seems to disappear. No other allusion is made to the subject; 2 Poll. & Maitl. 584, 591.

A still later writer who is as earnest in tracing the fountains of English law to a Roman source, as the writers last quoted are indisposed to do so, says on the subject:

"The presence in the Pandects of every important doctrine of *habeas corpus* is an interesting fact, and suggests that the proceeding probably came to England, as it did to Spain, from the Roman law. There is no evidence, so far as I have been able to discover, that the process was of British or Teutonic origin. It is fully described in the forty-third book of the Pandects. The first text is the line from the Perpetual Edicts, "*ait*

prætor; quem liberum dolo malo retines, exhibeas." "The prætor declares: produce the freeman whom you unlawfully detain." The writ was called the interdict or order; "*de homine libero exhibendo.*" After quoting this article of the Edict the compilers of the Pandects introduced the commentary of Ulpian to the extent of perhaps two pages of the modern law book, and the leading rules which he derives from the text are law, I believe, today in England, and in America. Thus he says:

"The writ is devised for the preservation of liberty, to the end that no one shall detain a free person."

"The word freeman includes every freeman, infant or adult, male or female, one or many, whether *sui juris*, or under the power of another. For we only consider this—Is the person free?"

"He who does not know that a freeman is detained in his house is not in bad faith; but as soon as he becomes aware of the fact he becomes in bad faith."

"The prætor says "*exhibeas*" (produce, exhibit). To exhibit a person is to produce him openly, so that he can be seen and handled."

"This writ may be applied for by any person; for no one is forbidden to act in favor of liberty."

And to this commentary of Ulpian the compilers also add some extracts from Venuleius, who, among other things, says:

"A person ought not to be detained in bad faith, for any time and so no delay should be granted to the person who detains him. In other words, a writ of *habeas corpus* should be returnable and heard *instanter*."

"It seems certain that this writ might have been applied for in Britain during the four centuries of Roman occupation, at least, when not suspended by a condition of martial law; and after the restoration of the Christian Church in the seventh century, and the occupation of judicial positions by bishops and other learned clerics, familiar with such procedure, it is not unreasonable to assume that it was revived and took its place in English law." Howe, *Studies in the Civil Law*, 54."

*. * * * The English colonists in America regarded the privilege of the writ as one of the dearest birthrights of Britons; and sufficient indications exist that it was frequently resorted to. The denial of it in Massachusetts by Judge Dudley, in 1689, to Rev. John Wise, imprisoned for resisting the collection of an oppressive and illegal tax, was made the subject of a civil action against the judge, and was, moreover, denounced as one of the grievances of the people, in a pamphlet published in 1689 on the authority of "the gentlemen, merchants and inhabitants of Boston and the country adjacent." In New York in 1707 it served to effect the release of the Presbyterian ministers Makemie and Hampton from an illegal warrant of arrest issued by the governor, Cornbury, for preaching the gospel without license. In New Jersey in 1710 the assembly denounced one of the judges for refusing the writ to Thomas Gordon, which they said was the "undoubted right and great privilege of the subject." In South Carolina in 1692 the assembly adopted the act of 31 Car. II. This act was extended to Virginia by Queen Anne early in her reign while in the assembly of Maryland in 1725 the benefit of its provisions was claimed independent of royal favor, as the "birthright of the inhabitants." The refusal of parliament in 1774 to extend the law of *habeas corpus* to Canada was denounced by the Continental congress in September of that year as oppressive, and was subsequently recounted in the Declaration of Independence as one of the manifestations on the part of the British government of tyranny over the colonies; Hurd, *Hab. Cor.* 109-120." Bouvier (*Rawles' Ed.*) Art. *Habeas Corpus*.

"*Habeas corpus*—A writ directed to the person detaining another and commanding him to produce the body of the prisoner

at a certain time and place; with the day and cause of his caption and detention, to do, submit to and receive whatsoever the court or judges, awarding the writ shall consider in that behalf." Bouvier (Rawles' Ed.)

"The writ of *habeas corpus* may be defined as a legal process designed and employed to give summary relief against illegal restraints of personal liberty." 2 Spelling, Inj. and Ex. Rem. § 1152.

For further authorities on the origin and history of the writ see: Wilmot's Opinions, 77 ff; Colquhoun, Sum. Rom. Civ. Law, section 387; Amos, Eng. Const. 171; 1 Hallam, Const. History of Eng.; Hurd, *Hab. Corpus*; Church, *Hab. Cor.*; Taylor, 2 Origin and Growth of English Constitution, p. 380 ff; 2 Kent Com. 26 ff; Hale, History of Common Law, 383; Cobbett, Parl. Hist. Eng. 487, ff; Crabbe, Hist. Eng. Law, 525.

2. Proper function of the writ.

EX PARTE COUPLAND.

1862. SUPREME COURT OF TEXAS. 26 Tex. 387.

MOORE, J.—The relator (Coupland) applied to the Chief Justice on the 16th of July, 1862, in vacation for a writ of *habeas corpus*, alleging that he was illegally restrained of his liberty by R. T. Allen, in Travis County, as he believed, "without any order or process whatever, or any color of either." The writ issued and Allen made return that the relator was placed originally in his custody by order of R. J. Townes, provost marshal of Travis county; but that before the service of the writ upon him, the relator had been enrolled as a soldier of the Confederate states, as a conscript, under the act of the congress of the Confederate states, entitled "An act to further provide for the public defence," and had selected his company, been attached to it and had been discharged from his original detention; and at the service of the writ, was only detained as a soldier of the Confederate states, belonging to a regiment of which respondent was colonel. On the hearing, the relator was remanded into the custody of the respondent. From this judgment the relator prosecutes this appeal.

The first question for our decision arises upon a motion by the attorney general who appears on behalf of the respondent Allen, that the application should for the present be continued, because, as he alleges, the relator, since he was remanded by the judgment of the chief justice into the custody of the respondent, as a soldier in the regiment of which he was in command has deserted and is no longer in the custody or under the control of the respondent. This motion is founded on an affidavit of a lieutenant

belonging to said regiment, from which it appears that the relator, together with other members of said regiment, after his return to it, was furloughed until the 15th of September last, at the expiration of which time he was ordered to report for duty at Tyler, Smith County, Texas. where the regiment was ordered to rendezvous; but up to the 25th of September, when affiant left camp, he had not joined the regiment or been heard of by him.

This motion is urged upon two distinct grounds; first, that the court has no jurisdiction on the application, if the relator has escaped from the custody to which he was remanded by the judgment from which he appeals. Secondly, if the court has jurisdiction, it will not act upon his application while he is at large. There is no doubt that in answer to the writ the respondent must produce the body of the person alleged to be illegally detained, if in his custody or under his control at the service of the writ, unless excused from so doing by the circumstances indicated in art. 149, Code Criminal Procedure; and that a return to the writ unaccompanied by the body will be scanned with great caution. Hurd on *Habeas Corpus* 244. And although this is to prevent evasions of the writ and to secure the liberty of the citizen, yet if the party has been released from custody, previous to the service of the writ, its object and purpose has been accomplished, and the court will make no order on the subject. *Commonwealth v. Chandler*, 11 Mass. 83; *U. S. v. Davis*, 5 Cr. C. C. 652. *The only object of the writ is to relieve the party detained from the illegal restraint; if this is accomplished before the jurisdiction of the court attaches by the service of the writ, there is nothing upon which it can attach. It is not the object or purpose of the writ to punish the respondent, or afford the party redress for his illegal detention.* But the question occupies a different attitude after the jurisdiction of the court has been attached. It cannot then be defeated by the wrongful act of either of the parties. It is expressly provided by the code of criminal procedure (art. 762), that upon the hearing of an appeal in *habeas corpus* cases, the defendant (who undoubtedly must be understood to be the prisoner or party detained), need not be personally present.

The second ground of the motion, we think as a question of practice, is well taken, if the facts of this case call for its application; and were it not, also, that from the character of the case, we think, the public interest will be better subserved by hearing the appeal than by its continuance. The rule of the court not to hear appeals in criminal causes where the defendant has escaped, to which this case is claimed to be analogous, being merely a matter of practice, depending in its application to particular cases upon the discretion of the court, and as the affidavit relied upon does not show conclusively that the relator has escaped from the custody

to which he was committed, and may not, after but a temporary delay, have joined his regiment, the motion for a continuance will be overruled.

The questions arising upon the merits on this application have been argued with great interest and zeal. Several of the points, however, made by the counsel for the relator, and most elaborately discussed, can have no influence in the decision of the case, as presented by the appeal, and doubtless had none in its determination by the chief justice, though out of abundant caution he permitted relator's counsel to save by bills of exception every question suggested by them as having any possible bearing upon the rights of their client.

As we have already said, *a party's right to the writ does not depend upon the legality or illegality of his original caption, but upon the legality or illegality of his present detention.* Dew's case, 18 Penn. 37; Rex. v. Gordon, 1 Barn. & Ald. 572 n; Hurd, on Hab. Cor. 255, 256. The relator was not, when the writ was served, detained by virtue of the order of the present provost marshal, by whose order he seems first to have been arrested. We will not therefore, consume time by a discussion of the questions that have been raised, as to the right or authority of a military officer in time of war to declare martial law, or the effect of such declaration when made, or upon whom martial law when declared can operate, or the nature and character of such law. Nor will it be at all necessary that we should inquire into the regularity of the proceedings of the enrolling officers by whom relator was enrolled as a soldier, for, if he is subject to conscription, this court is not the appropriate tribunal for correcting the errors, if any, into which these officers may have fallen in discharge of their appropriate military duties; but his application for redress must be made to their superior officers, or other proper military authorities. Art 756, Code of Criminal Procedure. * * *

(So much of the opinion as relates to the constitutionality of the "Conscript Law" is omitted.)

PEOPLE EX REL. STOKES v. RISELEY, SHERIFF.

1885. SUPREME COURT OF NEW YORK. 38 Hun. 280.

APPEAL from an order of the county judge of Ulster County, dismissing a writ of *habeas corpus* issued upon the application of the relator.

The relator, upon the thirty-first of January, 1885, was convicted before F. D. L. Montayne, a justice of the peace of the

town of Marbletown, in Ulster County, of the crime of having disposed of personal property, upon which he had theretofore executed a mortgage, and was sentenced to pay a fine of \$250, and to stand committed to the county jail of Ulster County until the fine be satisfied, not exceeding one year. Not paying the fine he was committed to the county jail, whereupon he sued out a writ of *habeas corpus*, before the county judge of Ulster County.

LONDON, J.:

The conviction of the relator was valid. (Penal Code, § 571). He therefore is not entitled to his discharge, because he should suffer proper punishment. (The People *ex rel.* Devoe v. Kelley, 97 N. Y. 215). But he was convicted before a court of special sessions held by a justice of the peace. Whatever punishment a court of record might impose upon conviction for this offense, a court of special sessions is restricted by section 717 of the code of criminal procedure; "the fine cannot exceed \$50, nor the imprisonment six months." Here the fine was \$250 with this addition, "and stand committed to the county jail of Ulster County until the fine be satisfied, not exceeding one year." Section 718 of the Code of Criminal Procedure provides that "a judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, specifying the extent of the imprisonment, which cannot exceed one day for every dollar of the fine." These sections are in part five, entitled, "of proceedings in courts of special sessions and police courts." Section 718 is a transcript of section 484 in part four, entitled "of the proceedings in criminal actions prosecuted by indictment."

It thus seems that the days of imprisonment cannot exceed the dollars of fine in the court. We think a court of special sessions could not pronounce the sentence thus imposed. The suggestion is made that the sentence is valid to the extent of fifty dollars and a liability to fifty days' imprisonment. We think not; *non constat* that the relator would not immediately have paid the fifty dollars if that had been imposed, and thus have escaped imprisonment altogether. Two hundred and fifty dollars might be quite beyond his ability to pay. Thus the illegal sentence confines him in jail, when a legal one might not, and in this respect the case is distinguishable from People *ex rel.* Trainer v. Baker (89 N. Y. 460.)

The People *ex rel.* Devoe v. Kelly is authority to the effect that a writ of *habeas corpus* is the proper remedy. The relator is detained upon an invalid judgment; it needs a valid one legally to detain him. Section 2016 of the code of civil procedure denies *habeas corpus* to a person "where he has been committed, or is detained by virtue of the final judgment or decree of a competent tribunal." It was held in People *ex rel.* Tweed v. Liscomb (60 N. Y. 559). as explained People *ex rel.* Woolf v. Jacobs (66 N.

Y. 10), that, when pronouncing its sentence the court has exhausted its authority, if it proceed further to pronounce additional sentences, such additions are void. Thus "the final judgment" must be "of a competent tribunal," and where the competency to pronounce it is exhausted, or never existed, it does not come within the definition of the final judgment as to which *habeas corpus* is ineffective.

It is suggested that the relator's remedy is by appeal. No doubt, upon appeal, the court could set aside the illegal judgment and pronounce a legal one. (Code of Crim. Pro. §§ 543, 764.) But, meantime, it is true that the relator is unlawfully detained upon an invalid sentence, and he should be speedily freed from that restraint. Since we cannot detain him upon this sentence, and in this proceeding cannot ourselves pronounce any, and as it is impracticable to remand him to the court of special sessions, we must discharge him.

The order of the county judge is reversed, and the defendant discharged.

Order reversed and relator discharged.

See also *Commonwealth v. Chandler*, 11 Mass. 83; *Wales v. Whitney*, 114 U. S. 564; *Kirby v. State*, 62 Ala. 51; *State v. Morales*, 38 La. Ann. 919; *McCullough, Ex parte*, 35 Cal. 97; *Arkansas Industrial Co. v. Neel*, 48 Ark. 283; *Mooney, Ex parte*, 26 W. Va. 36.

EX PARTE STRAHL.

1864. SUPREME COURT OF IOWA. 16 Ia. 369.

WRIGHT, Ch. J.—Petitioner was arrested and held in custody under a writ issued by W. H. Leas as Mayor of the city of Des Moines, for an offense against the ordinances of said city. In said petition, he claims that said Leas, is not the mayor of said city, and that he was never elected as such mayor, and that he had no power or authority to issue said writ. The answer shows that said Leas was declared duly elected, that a certificate of election was issued by the proper officer in due form, that he took the oath and executed the bond required by law, entered upon the discharge of his duties, and was in the exercise of the same as such mayor, at the time of the issuing of said writ.

To this answer a demurrer is interposed, claiming, in substance, that it does not show that said Leas was mayor *de jure*, and that though an officer *de facto*, this would not authorize him to exercise the duties, issue the writ, and hold the petitioner in custody.

There is a clear distinction between a clear bold assumption of right to exercise the duties of an officer and their exercise

under color of right. If, A, without any pretense of an election, or an appointment to an office, or without any claim of right, should issue a process and cause the arrest of an alleged offender, we would not hesitate to hold the restraint illegal and discharge the prisoner. But where it appears as in this answer, that no other person was exercising or discharging the duties of the office, that the incumbent had been declared duly elected, received his certificate of election, filed his bond, and entered upon the discharge of his duties, and was in the exercise thereof, in issuing the writ for the arrest of the prisoner, and detaining him, a very different question arises, and in such case, the legality of the restraint, in our opinion, cannot be inquired into by *habeas corpus*.

The respondent under such circumstances, holds the office under color of right, and though not an officer *de jure*, his right to hold it will not be inquired into in this proceeding, but a direct proceeding should be instituted to first determine the legality of the holding.

It is claimed in the petition that one Absolom Morris was elected to said office, so declared, and that he and not respondent is the real and actual mayor of said city. With this statement it is but too manifest, that the object of this proceeding in effect is to try and contest the right of Leas to said office, or to convert this writ into a contested election proceeding. That the investigation may stop short of an inquiry into all the facts attending said election, whether the one or the other received a majority of the legal votes, cast at the election, whether the canvassers erred in granting the certificate of election to respondent rather than his competitor, cannot affect the question; for, after all the purpose and object of this proceeding is the same, and such inquiry we do not feel authorized to make. If decided either way, no right would be settled between the real contestants. We can do no more than say that this prisoner is or is not legally detained. The very nature and framework of the writ shows that this is its sole office, and that it cannot be converted into process under which the rights of parties to official position can be settled and determined. Our statutes provide other and more direct and well understood and settled methods for determining such controversy.

None of these cases cited by the petitioner relate to a proceeding of this character, nor does any of them hold that the officer may not, in such a case, justify, when he is in the actual discharge of the duties of the office, under color of right, or an election or an appointment, while the following cases clearly support the foregoing views, and warrant us in overruling a demurrer. *Ex parte Walker*, 3 B. Mon. 166; *Wilcox v. South*, 5 Wend. 235; *Aulamier v. The Governor*, 1 Texas 653; *Douglass v. Wichlie*, 19 Conn. 489.

Demurrer overruled.

(Subsequent opinion of DILLON, J., on rights of *de facto* officer and validity of his acts, omitted.)

Habeas corpus can never be used to serve the purpose of a writ of *Quo Warranto*. Corrigan, *In re*, 37 Mich. 66; Sheehan's case, 122 Mass. 445; Green v. Burke, 23 Wend. (N. Y.) 490; *Ex parte* Call, 2 Tex. App. 497; State v. Bloom, 17 Wis. 521; Strang, *Ex parte*, 21 Ohio St. 610.

IN RE LEMKUHI.

1887. SUPREME COURT OF CALIFORNIA. 72 Cal. 53; 13 Pac. 148.

FOOTE, C.—The petitioner was tried before the police court of the city of Oakland for a misdemeanor, viz., the commission of a nuisance in obstructing Broadway, a street of said city. The judgment was that he pay a fine of two dollars, or be imprisoned until said fine be duly satisfied, at the rate of one day's imprisonment for each dollar of fine. The captain of the police of the city of Oakland has him in custody, by virtue of a writ of commitment issued from the police court of said city under its judgment and conviction as aforesaid. The only defence which the defendant set up (as he says in his petition for the writ) why he should not have been convicted and punished for his alleged offense, was that he was authorized by an ordinance of the City of Oakland to obstruct the street as he did. The complaint upon which the defendant was tried properly charged an offense against the laws of the state, as defined in section 370, Pen. Code, and made punishable as a misdemeanor under section 372, same code. We do not perceive anything in the complaint or the record of the police court which shows that the defendant had any justification or defense which would bar his prosecution for the offense alleged against him. And the court which tried him had jurisdiction of the offense. St. 1873-74, p. 906. But the defendant contends that, as a fact in the case, he was justified by reason of a certain ordinance of the city of Oakland, in doing what would otherwise have been a violation of the state law. This ordinance he quotes at length in his petition for a writ of *habeas corpus*.

Thus it appears that the court who tried the defendant had jurisdiction of his person, and the offense for which he was tried, and that it tried, convicted and sentenced him, perhaps, under an erroneous view of conflicting laws. What this court is now asked to do is to restore him to liberty on a writ of *habeas corpus*, because of the error of law committed by the trial court. We do not perceive how, in such a proceeding, this court can review the

alleged erroneous action of the court below. "The writ of *habeas corpus* was not framed to retry issues of fact, or to review the proceedings of a legal trial." *Ex parte Bird*, 19 Cal. 130. The petitioner's contention only involves a question of mere error, and that cannot be inquired into upon the writ here invoked, but only upon proceedings in error. *Ex parte Max*, 44 Cal. 579, 581; *Ex parte Cohn*, 55 Cal. 193, and cases cited.

The petition should be dismissed, and the petitioner remanded to the custody of the captain of the police of the city of Oakland.

By the court. For the reasons given in the foregoing opinion, petition dismissed and petitioner remanded.

EX PARTE SNYDER.

1888. COURT OF APPEALS OF MISSOURI. 29 Mo. App. 256.

PHILLIPS, P. J.—The petition, and accompanying papers, and the return of the marshal of Jackson County, disclose the following state of facts : At the May term 1887, of the Jackson county criminal court the petitioner was indicted by the grand jury in and for said county for the offence of an assault with intent to commit a rape. On the trial had thereon, at said term, the jury failed to agree and were discharged. At the succeeding term of the said court, to wit, on the fifteenth day of September, 1887, petitioner was again put upon trial, and the jury returned into court the following verdict "We the jury find the defendant guilty, and assess his punishment at six months in the county jail." Thereupon without any motion, either by the prisoner or the prosecuting attorney, the court of its own motion ordered the verdict set aside, and further ordered that the jurors therein be forever disqualified as jurors in said court. The court further ordered that the cause be set down for retrial on the twenty-sixth day of October, 1887. On the day last named the prisoner presented his petition to Hon. Turner A. Gill, judge of the circuit court of Jackson county, setting out the facts aforesaid, and praying for a writ of *habeas corpus*, to secure the release of the prisoner on the ground that he could not again be put in jeopardy, as proposed by the second trial of the judge of the criminal court. Judge Gill, on hearing the petition, and the facts, while holding that the further prosecution of the prisoner under said indictment was in contravention of the constitutional right of the prisoner, yet refused to discharge him, as he was amenable to the punishment returned by the first jury, and so remanded him to the custody of the marshal. The criminal

court thereupon continued said cause to the next regular term, and it was again set for trial on the tenth day of January, 1888. At this date the defendant filed his plea, in the nature of a plea in bar, setting up the former trial and the proceedings under said indictment. The court thereupon reset the cause for trial on the thirtieth day of January, 1888, when it again proceeded to retry the defendant. While permitting the record of the former trial to be read in evidence, the court, nevertheless, instructed the jury to disregard it. The jury returned a verdict of guilty, assessing the punishment at five years in the penitentiary. The court entered up judgment accordingly. Thereupon this prisoner makes his application to this court, for his discharge under the writ of *habeas corpus*. * * * *

II. The remaining question is, how is the party to obtain relief from the legal wrong thus done him? The authorities are quite uniform in holding that the proper course is for the prisoner to move in the trial court for his discharge, or to plead in bar the former conviction or acquittal. And if this plea be overruled by that court, to correct the error by appeal or writ of error to or from the court having appellate jurisdiction over the offence, which, in this case, is the supreme court. See authorities *supra*; 1 Bish. Crim. Proc. § 821. *It is a general rule that the writ of habeas corpus does not perform the functions of a writ of error.* It is an original proceeding in which such judgments are not liable to collateral attack. *Platt v. Harrison*, 6 Ia. 79; *In re Mary Eaton*, 27 Mich. 1. Accordingly our statute declares (section 2648), that: "It shall be the duty of the court forthwith to remand the party, if it shall appear that he be detained in custody, by virtue of the final judgment, etc., of any competent court of civil or criminal jurisdiction," etc. None of the exceptions enumerated in section 2650 to this provision, afford any relief to the petitioner, as they are inapplicable to the facts of this case. *Ex parte Beoninghausen*, 91 Mo. 301. The conclusion reached is, as we conceive, fully sustained by the doctrine announced in *Ex parte Ruthven*, 17 Mo. 541. The prisoner was put to trial for murder. After the trial had proceeded for several days, the court discharged the jury, in the absence of the prisoner and without his consent. Council for prisoner thereupon moved for his discharge, on the ground that the jury had been illegally discharged, and, of consequence the prisoner could not be retried, having once been in jeopardy. This motion having been denied, the prisoner applied to the supreme court for the writ of *habeas corpus*. *Gamble, J.*, who delivered the opinion, after referring to the statute above named, said: "The prisoner in this case is imprisoned on an indictment found in a court of competent jurisdiction. He cannot be discharged upon *habeas corpus* by showing that he has a defence to it; and if the

facts on which he relies be a defence in law, they must be pursued in the court in which the indictment is pending. If the court fail to give them their proper effect, this court as an appellate court, can correct the error; but on a *habeas corpus* it acts with no more power than belongs to a justice of the county court, under the *habeas corpus* act, and will not, under such process, review the proceedings of the circuit court. It is said that the discharge of the jury discharged the indictment. The circuit court has decided otherwise. Shall a justice of the county court, on *habeas corpus*, review a decision, and discharge the prisoner? We think not, nor will this court.

We have no more right to discharge the prisoner against the established rules of procedure, than the criminal court has to hold him contrary to law. He has his remedy, to protect his liberty, and to that we must remit him.

The discharge of the prisoner, is, therefore, refused, and he is remanded to the custody of the marshal of Jackson county. ELLISON, J., concurs, HALL, J., absent.

(So much of the opinion as relates to the question of former jeopardy and holds the action of the trial court erroneous in setting aside the verdict of the jury in the second trial, is omitted.)

That *habeas corpus* will not be allowed in lieu of appeal or writ of error, see: Bonner, *In re*, 57 Fed. 184; Hartman, *Ex parte*, 44 Cal. 32; Sennott's Case, 146 Mass. 489; Ellis, *In re*, 79 Mich. 322; State v. Mace, 5 Md. 337; Bowen, *Ex parte*, 25 Fla. 214; Bond, *Ex parte*, 9 S. Car. 80; People v. Kelly, 32 Hun (N. Y.), 536; Milburn, *Ex parte*, 59 Wis. 24; Pearce, *Ex parte*, 111 Ala. 99; Black, *In re*, 52 Kans. 64; State v. McClay, 36 Neb. 282; Copenhaver, *In re*, 118 Mo. 377; Perdue, *Ex parte*, 58 Ark. 295; Emanuel v. State, 36 Miss. 627; Boland, *Ex parte*, 11 Tex. App. 159; Platt v. Harrison, 6 Iowa, 79; Fanton, *In re*, 55 Neb. 703; Commonwealth v. McAleese, 192 Pa. St. 410; Bishop, *In re*, 172 Mass. 35; People v. Warden, etc., 44 Misc. (N. Y.) 149; Dimmick v. Tompkins, 194 U. S. 540; O'Neal, *Ex parte*, 125 Fed. 967; People v. Murphy, 202 Ill. 493.

3. Writ when issued paramount over all other writs.

MATSON V. SWANSON ET AL.

1890. SUPREME COURT OF ILLINOIS. 131 Ill. 255; 23 N. E. 595.

SUIT by Canute R. Matson against John L. Swanson and Charles A. Florence, upon a bond given under the following state of facts: Henry Bodelson, being in custody under a writ of *capias ad satisfaciendum* issued in the suit of Carlson v. Bodelson, petitioned for a writ of *habeas corpus*. The judge granting the writ ordered that Bodelson be released from custody, pending the hearing, upon giv-

ing bond; and such bond is the one sued on. The trial court gave judgment for the plaintiff, but the appellate court reversed the judgment, and the plaintiff appeals.

SCHOLFIELD, J.—The appellate court reversed the judgment of the circuit court, as we learn from its opinion (*Swanson v. Matson*, Ill. App.) on two grounds: First, that the judgment of *Carlson v. Bodelson*, is not stated in the declaration; second, that the bond declared upon is void. However obnoxious the declaration may have been to demurrer on the first of these grounds, we are of opinion that ground is not tenable as an objection on motion in arrest. This objection is not that which is attempted to be stated is not a cause of action, but that a cause of action is defectively stated; and that cannot be urged on motion in arrest of judgment. Gould, Pl. § 13, c. 10, p. 496; 1 Ch. Pl. (7th Amer. Ed.) 710; 2 Tidd. Pr. (4th Amer. Ed.) 918, 919. Moreover, if the ruling of the appellate court rested on that ground alone, the record should have been remanded to the circuit court, in order that the declaration might be amended, and there be a trial *de novo* upon the amended declaration. Section 59, c. 110, Rev. Sts. 1874.

The reason expressed in the opinion for which the bond is held to be void is that there is no statute or common law authority for setting at liberty, temporarily, on any form of security, one in custody under valid final process in a civil cause, except under the acts concerning insolvents. The statute of 23 Henry VI, c. 9, recited in Bacon's Abr. tit. "Sheriff," O. and *Sullivan v. Alexander*, 19 Johns. 233 are cited in support of this position. The statute and the case referred to have reference exclusively to the action of the sheriff when acting of his own motion and no reference to cases wherein he is acting under direct orders of a court of competent jurisdiction, as is clearly apparent from an examination of them. But our *habeas corpus* act makes it the duty of circuit courts, and of the judges thereof in vacation, upon proper petition, to issue writs of *habeas corpus*, and allows them to thereupon discharge from the custody of sheriff's prisoners held by virtue of process from courts legally constituted, in seven enumerated classes of cases. Section 22, c. 65, Rev. Stats. 1874. The right to admit to bail, after the return of the writ pending the hearing is conceded by counsel for appellees to be within the discretion of the court, but they insist that such right does not exist until after the return of the writ. But if there is power to issue writs of *habeas corpus* in certain cases, and power to admit to bail pending hearing upon that writ, since in this case the petitioner was by his petition before the court, there was at least, so far as his rights were concerned jurisdiction of the subject matter and of the person, and therefore, however erroneous the order to issue the writ of *habeas corpus* and admit to bail, it was not

void; and the sheriff had no discretion but was bound to obey the writ when he received it, and to admit the petitioner to bail, when he tendered the prescribed bond. *The moment the sheriff received the writ of habeas corpus, the custody of the petitioner by virtue of the writ of capias ad satisfaciendum terminated, and his custody by virtue of the writ of habeas corpus began, because the authority of all other writs gives way and yields to the authority of that writ.* The petitioner was not compelled to give bail but he had the right to do so, under the orders of the court; and he elected to avail himself of that right, and to be thereby relieved from imprisonment pending the hearing. When, therefore, the petitioner gave the bail he was not held under the writ of *capias ad satisfaciendum*, but under the writ of *habeas corpus*; and so it was the act of the court in ordering the writ of *habeas corpus*, and not the act of the sheriff in admitting him to bail, that released him from custody under the former writ. *In re Kaine*, 14 How. 133, 144; *Barth v. Clise*, 12 Wall. 400; *Pomeroy v. Lappeus*, 9 Or. 363; *Hurd*, Hab. Cor. 324; 9 Amer. & Eng. Enc. Law, 200, and cases cited. And had the prayer of the writ on the hearing of the *habeas corpus* been denied, the petitioner would have been simply remitted back to the custody of the sheriff under the writ of *capias ad satisfaciendum*. *King v. Bethel*, 5 Mod. 22. Our conclusion, therefore, is that the bond is not void.

See also *Barth v. Clise*, 12 Wall. (U. S.) 401; *In re Kaine*, 14 How. (U. S.) 103; *State v. Sparks*, 27 Tex. 705.

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4. What constitutes sufficient detention or restraint to warrant the issue of the writ.

WALES v. WHITNEY, SECRETARY OF THE NAVY.

1885. SUPREME COURT OF THE UNITED STATES. 114 U. S. 564.

(PETITIONER, Medical Director of the Navy, was charged with certain offences and by an order of the Secretary of the Navy, was directed to present himself for trial at a future day before a naval court martial and in the meantime to consider himself under arrest and ordered to confine himself to the limits of the city of Washington. The return of the Secretary of the Navy to the writ of *habeas corpus* denied that he had custody of said petitioner or that the latter was under detention or deprived of his liberty.)

(So much of the opinion as relates to the jurisdiction of the naval court martial is omitted.)

MR. JUSTICE MILLER delivered the opinion of the court.

* * * Two questions have been elaborately argued before us, namely:

1. Does the return of the Secretary of the Navy to the writ and its accompanying exhibits show such restraint of the liberty of the petitioner by that officer, as justifies the use of the writ of *habeas corpus*?

2. If there is a restraint, which, in its character, demands the issue of the writ, are the charges for which the petitioner is required to answer before the naval court martial of the class of which such a court has jurisdiction?

The latter is a question of importance, and not free from difficulty, since its solution requires the court to decide whether the Surgeon General of the Navy, as chief of the bureau of medicine and surgery in the Department of the Navy, under the immediate supervision of the Secretary, is liable for any failure to perform his duties, as Surgeon General, to be tried by a military court, under the articles of war governing the Navy, or has a right for such offences to be tried alone by the civil courts, and according to the law for offences not military. Is he, in that character, in the civil or military service of the United States? The difficulty of stating the question shows the embarrassment attending its decision.

The other question, however, has precedence, both because it is the one on which the court of the district decided the case, because, if there was no such restraint, whether legal or illegal, as to call for the use of the writ, there is no occasion to inquire into its cause.

It is obvious that relator is under no physical restraint. He walks the streets of Washington with no one to hinder his movements, just as he did before the secretary's order was served on him. It is not stated as a fact in the record, but it is a fair inference, from all that is found in it, that as, Medical Director, he was residing in Washington and performing there the duties of his office. It is beyond dispute that the Secretary of the Navy had the right to direct him to reside in the city in performance of these duties, and, in order to leave Washington lawfully, he would have to obtain leave of absence. He must, in such case, remain here until otherwise ordered or permitted. It is not easy to see how he is under any restraint of his personal liberty by the order of arrest, which he was not under before. Nor can it be believed that, if this order had made no reference to a trial on charges against him before a court martial, he would have felt any restraint whatever, though it had directed him to remain in the city until further orders. If the order had directed him so to remain, and act as a member of such court, can any one believe he would have felt himself a prisoner, entitled to the benefit of a writ of *habeas corpus*?

On the other hand, there is an obvious motive on the part of

the petitioner for construing this order as making him a prisoner in the custody of the Secretary.

That motive is to have himself brought before a civil court, which on inquiry into the cause of his imprisonment, may decide that the offence with which the Secretary charges him is not of a military character, is not one of which a naval court martial can entertain jurisdiction, and, releasing him from the restraint of the order of arrest, it would incidentally release him from the power of that court.

But neither the Supreme Court of the District nor this court has any appellate jurisdiction over courts-martial, nor over offences which such court has the power to try. Neither of these courts is authorized to interfere with it in the performance of its duty, by way of a writ of prohibition or any order of that nature. The civil courts can relieve a person from imprisonment under order of such court only by writ of *habeas corpus*, and then only when it is made apparent that it proceeds without jurisdiction. If there is no restraint there is no right in the civil court to interfere. Its power then extends no further than to release the prisoner. It cannot remit a fine, or restore to an office, or reverse the judgment of the military court. Whatever effect the decision of the court may have on the proceedings, orders or judgments of the military courts, is incidental to the order releasing the prisoner. Of course, if there is no prisoner to release, if there is no custody to be discharged, if there is no such restraint as requires relief, then the civil court has no power to interfere, with the military court, or other tribunal over which it has by law no appellate jurisdiction.

The writ of *habeas corpus* is not a writ of error, though in some cases in which the court issuing it has appellate power over the court by whose order the petitioner is held in custody, it may be used with the writ of *certiorari* for that purpose. In such case, however, as the one before us, it is not a writ of error. Its purpose is to enable the court to inquire, first, if the petitioner is restrained of his liberty. If he is not, the court can do nothing but discharge the writ. If there is such restraint, the court can then inquire into the cause of it, and if the alleged cause be unlawful it must then discharge the prisoner.

There is no very satisfactory definition to be found in the adjudged cases of the character of the restraint or the imprisonment suffered by the party applying for the writ of *habeas corpus*, which is necessary to sustain the writ. This can hardly be expected from the variety of restraints for which it is used to give relief. Confinement under civil and criminal process may be so relieved. Wives restrained by husbands, children withheld from the proper parent or guardian, persons held under arbitrary custody by private individuals, as in a madhouse, as well as those under military

control, may all become proper subjects of relief by the writ of *habeas corpus*. Obviously, the extent and character of the restraint which justifies the writ must vary according to the nature of the control which is asserted over the party in whose behalf the writ is sought.

In the case of a man in the military or naval service, where he is, whether as an officer or as a private, always subject more or less in his movements, by the very necessity of military rule and subordination, to the orders of his superior officer, it should be made clear that some unusual restraint upon his liberty or personal movements exists to justify the issue of the writ; otherwise every order of the superior officer directing the movements of his subordinates, which necessarily to some extent curtails his freedom of will, may be held to be a restraint of his liberty, and the party so ordered may seek relief from obedience by means of a writ of *habeas corpus*.

Something more than moral restraint is necessary to make a case for *habeas corpus*. *There must be an actual confinement or the present means of enforcing it.* The class of cases in which the sheriff or other officer, with a writ in his hands for the arrest of a person whom he is required to take into custody, to whom the person to be arrested submits without force being applied, comes under this definition. The officer has the authority to arrest and the power to enforce it. If the party named in the writ resists or attempts to resist, the officer can summon bystanders to his assistance, and may himself use personal violence. Here the force is imminent and the party is in the presence of it. It is physical power which controls him, though not called into demonstrative action.

It is said in argument that such is the power exercised over the appellant under the order of the Secretary of the Navy. But this is we think, a mistake. If Dr. Wales had chosen to disobey this order, he had nothing to do but take the next or any subsequent train from the city and leave it. There was no one at hand to hinder him. And though it is said that a file of marines or some proper officer could have been sent to arrest and bring him back, this could only have been done by another order of the Secretary, and would be another arrest, and a real imprisonment under another and distinct order. Here would be a real restraint of liberty, quite different from the first. The fear of this latter proceeding, which may or may not keep Dr. Wales within the limits of the city, is a moral restraint which concerns but his own convenience, and in regard to which he exercises his own will.

The present case bears a strong analogy to Dodge's case in 6 Martin, (La.) 569. It appeared there that the party who sued out the writ had been committed to jail on execution for debt, and having given the usual bond by which he and his sureties were bound to pay the debt if he left the prison bounds, he was ad-

mitted to the privilege of these bounds. The plaintiff in execution failing to pay the fees necessary to the support of the prisoner, the latter sued out the writ of *habeas corpus*.

The eminent jurist, Chief Justice Martin, said, on appeal to the Supreme Court: "It appears to us that the writ of *habeas corpus* was improperly resorted to. The appellee was under no physical restraint and there was no necessity to recur to a court or judge to cause any moral restraint to cease. The sheriff did not retain him, since he had admitted him to the benefit of the bounds; the doors of the jail were not closed on him, and if he was detained it was not by the sheriff or jailer. If his was a moral restraint it could not be an illegal one. The object of the appellee was not to obtain the removal of an illegal restraint from a judge, but the declaration of the court that the plaintiff in execution had by their neglect lost the right of detaining him. A judgment declaring such neglect, and pronouncing on the consequences of it, was what the appellee had in view." The judgment awarding the writ was reversed. The analogy to the case before us is striking.

A very similar case was passed upon by the Supreme Court of Pennsylvania in *Republica v. Arnold*, 3 Yeates 263. A party who had been indicted for arson, and had given bail for his appearance to answer the indictment, applied, while out under bail, to be released under the writ of *habeas corpus*, on the ground of delay in the prosecution. The court held that the statute of Pennsylvania, which was a re-enactment of the *habeas corpus* act of 31 Charles II, Ch. 2, spoke of persons committed or detained, and clearly did not apply to persons out on bail. And Mr. Justice Yates very pertinently inquires "would not a *habeas corpus* directed to the bail of a supposed offender be perfectly novel?" And Smith, J., said that the inclination of his mind was that *habeas corpus* could not lie to the bail.

In a note to the cases of *Rex v. Dawes* and *Rex v. Kessel*, 1 Burrows 638, the same principle is stated, though by whom the note is made does not appear. Both these persons were brought before Lord Mansfield in the King's Bench, on a rule against the commissioners to enforce an act of parliament to increase the army. In both cases the ground on which the discharge was asked was that they were illegally pressed into the service. Lord Mansfield discharged one because his statement was found to be correct, and refused the other because his statement was not true.

The note to the report, apparently in explanation of the fact that they were not brought before the court by writ of *habeas corpus*, and that no objection was taken to the rule by the commissioner, says: "Neither of these could have brought a *habeas corpus*; neither of them was in custody. Davies had deserted and absconded, and Kessel had been made a corporal. No objection was made by

the commissioner to the propriety of the method adopted." In the continuation of Chief Baron Comyn's Digest, published in 1776, and in Rose's edition of that Digest, these cases are cited as showing that the parties could not bring *habeas corpus*, because they were not in custody. Comyn's Digest, Continuation, p. 345; 4 Comyn's Digest, (4th ed. 8vo. London, 1800) 313; *Habeas corpus*, B.

While the acts of congress concerning this writ are not decisive, perhaps, as to what is a restraint of liberty, they are evidently framed in their provisions for proceedings in such cases on the idea of the existence of some actual restraint. Rev. Stats. § 754 says the application for the writ must set forth "in whose custody he (the petitioner) is detained, and by virtue of what claim or authority, if known;" § 755, that "the writ must be directed to the person in whose custody the party is;" § 757 that this person shall certify to the court of justice before whom the writ is returnable the true cause of the detention; and by § 758 he is required "at the same time to bring the body of the party before the judge who granted the writ."

All these provisions contemplate a proceeding against some person who has the immediate custody of the party detained, with the power to produce the body of such party before the court or judge, that he may be liberated if no sufficient reason be shown to the contrary.

In a case of a person who is going at large, with no one controlling or watching him, his body cannot be produced by the person to whom the writ is directed, unless by consent of the alleged prisoner, or by his capture and forcible traduction into the presence of the court.

The record in the present case shows that no such thing was done. The Secretary denies that Wales is in his custody, and he does not produce his body; but Wales on the direction of the Secretary, appears without any compulsion, and reports himself to the court and to Justice Cox as he did to the court martial.

We concur with the Supreme Court of the District in the opinion that the record does not present such a case of restraint of personal liberty as to call for a discharge by a writ of *habeas corpus*.

In thus deciding we are not leaving the appellant without remedy if his counsel are right in believing the court martial has no jurisdiction of the offence with which he is charged. He can make that objection to that court before trial. He can make it before judgment when all the facts are before that court. He can make it before the reviewing tribunal.

If that court finds him guilty, and imposes imprisonment as part of a sentence, he can then have a writ to relieve him of that imprisonment. If he should be deprived of office, he can sue for his pay and have the question of the jurisdiction of the court which

made such order inquired into in that suit. If his pay is stopped, in whole or in part, he can do the same thing. In all these modes he can have relief if the court is without jurisdiction, and the inquiry into that jurisdiction will be more satisfactory after the court shall have decided on the nature of the offence for which it punishes him than it can before. And this mode of relief is more in accord with the orderly administration of justice and the delicate relations of the two classes of courts, civil and military, than the assumption in advance, by the one court that the other will exercise a jurisdiction which does not belong to it.

The judgment of the Supreme Court of the District of Columbia is

Affirmed.

EX PARTE SNODGRASS.

1901. COURT OF CRIMINAL APPEALS OF TEXAS. 43 Tex. Crim. Rep. 359; 65 S. W. 1061.

BROOKS, J.—Upon application of the relator for the writ of *habeas corpus*, the same was granted by presiding-judge Davidson, and made returnable before the court for hearing on November 13, 1901, at which time the assistant-attorney-general filed t' following motion to dismiss the application, towit: "Now comes the state by the assistant-attorney-general, and would show the court that the applicant herein was ordered by the district judge committed to jail pending the payment of a fine of \$50 assessed against him for contempt of court, and that said applicant was never by the sheriff committed to jail, so the state is credibly informed and believes, but was by the sheriff admitted on parole, and permitted to be enlarged, upon his promise to protect him in the premises; and said applicant was beyond the custody of the sheriff, and not within the jail of said Coleman county, before this court admitted him upon bail, as shown by the record herein. Wherefore the state would show the court that, by reason of the enlargement of the applicant, this court is without jurisdiction to hear the application, and the state moves the court that this application be dismissed." The judgment of the court finding the applicant guilty of contempt was entered on September 11, 1901, and the commitment was issued on the 26th of September. The writ of *habeas corpus* was granted by this court on October 7th, applicant being admitted to bail in the sum of \$200 pending the disposition thereof. Relator, Frank L. Snodgrass, being sworn, states substantially that, some days after the court fined him, judgment was entered by the court, and upon said judgment commitment was issued; that the sheriff met the re-

lator upon the streets, and arrested him on said commitment. Thereupon the relator requested the sheriff to appoint some one or go himself with relator to relator's house, as his child was very sick with diphtheria, and relator could not with safety ask the neighbor ladies to wait upon his child with a contagious disease. Relator's wife was dead, and there was no one to properly care for the child besides himself. The officer informed the relator he would not go himself, nor appoint any one, but relator could go home, if he would promise that under no circumstances or conditions would he leave the bedside of his child, except to go to relator's office and back. Relator promised upon honor to comply with the conditions imposed upon him, and he did. While this character of enlargement, if it be termed such, was in existence, relator applied to this court for the writ of *habeas corpus*, which was granted, and he was released on bond. It will be noticed this is an original application for the writ of *habeas corpus*, and not an appeal from an order refusing bail; hence we apprehend the rules covering the same are somewhat different in reference to the confinement or imprisonment.

Article 170, Code Cr. Proc. provides:

"The same power may be exercised by the officer executing the warrant (and in like manner) in cases arising under the foregoing articles as is exercised in the execution of warrants of arrest according to the provisions of the code.

"Art. 171. The words "confined," "imprisoned," "in custody," "confinement," "imprisonment," refer not only to the actual corporeal and forcible detention of a person, but likewise to any and all coercive measures by threats, menaces or the fear of injury whereby one person exercises a control over the person of another and detains him within certain limits."

"Art. 172. By "restraint" is meant the kind of control which one person exercises over another, not to confine within certain limits, but to subject him to the general authority and power of the person claiming such right."

"Art. 173. The writ of *habeas corpus* is intended to be applicable to all such cases of confinement and restraint, where there is no lawful right in the person exercising the power, or where, though the power in fact exists, it is exercised in a manner or degree not sanctioned by law."

Article 154, Code Cr. Proc. requires that "every provision relating to the writ of *habeas corpus* shall be most favorably construed in order to give effect to the remedy and protect the rights of the person seeking relief under it." Articles 151, 152, 164, 166, 167, *Id.*, contemplate that a person is entitled to the writ not only in case of actual custody, but also in case of any illegal restraint. Article 172 states that by "restraint" is meant the kind of control

which one person exercises over another, not to confine him within certain limits, but to subject him to the general authority and power of the person claiming such right. We think this article alone is decisive of the question, and that the state's motion should not prevail. We deem it unnecessary to enter into a long discussion of these articles, but suffice it to say *that any character or kind of restraint that precludes an absolute and perfect freedom of action on the part of relator authorizes such relator to make application to this court for release from such restraint.* It certainly cannot be insisted that, if relator is illegally arrested (if he is illegally arrested) he must be placed in jail, and thereby be subjected to an additional outrage, before he can apply to this court for the writ of *habeas corpus*. The motion of the state to dismiss the application is overruled: * * *

(So much of the opinion as relates to the validity of the commitment is omitted.)

In *United States v. Jung Ah Lung*, 124 U. S. 621, the erroneous refusal to permit a Chinese passenger to land, was held to be a detention, and restraint within the meaning of the United States' *Habeas Corpus* Act.

And see also *In re Callicot*, 8 Blatchf. (U. S.) 89; *Commonwealth v. Doran*, 15 Pa. Co. Rep. 385; *Commonwealth v. Ridgeway*, 2 Ashm. (Pa.) 247; *In re Farrell*, 22 Colo. 461; *Foster, Ex parte*, 44 Tex. Cr. App. 423; *Ex parte Mears*, 3 Utah, 50; *Lampert, In re*, 21 Hun (N. Y.), 154; *Esselborn, In re*, 20 Blatchf. (U. S.) 1; *Williamson v. Lewis*, 39 Pa. St. 9.

In *Commonwealth v. Ridgeway*, 2 Ashm. 247, the rule was declared that "whenever a person is deprived of the privilege of going when and where he pleases, he is restrained of his liberty, and has a right to inquire if that restraint be illegal and wrongful; and that whether it be exercised by a jailor, constable, or private individual."

TERRITORY OF KANSAS EX REL. GOSS v. CUTLER.

1860. SUPREME COURT OF KANSAS. 1 Kan. (2d. Ed.) 565.

THE opinion of the court was delivered by—

WILLIAMS, J.—On the 23d day of June, 1860, Alfred F. Goss filed his petition in the supreme court of the territory (the court being then in session in the city of Leavenworth) praying for a writ of *habeas corpus*. The petition sets forth the following facts: "That at the County of Leavenworth, Kansas Territory, he was illegally, unlawfully and unjustly detained and restrained of his liberty by Martin V. Cutler, a constable of the said county. That he was thus restrained of his liberty under color of authority derived from a warrant of commitment, for the imprisonment of petitioner, derived from one W. H. Fox, a justice of the peace in and for the town of Delaware, in said county. That the facts concerning said arrest and detention are as follows: viz: On the 29th day

of May, 1860, one H. D. Smith, made a complaint in writing and under oath, before one Bucks, a justice of the peace of said county, charging petitioner with the crime of perjury, upon which a warrant was issued. That on the 20th day of June, 1860, he was arrested and taken before W. H. Fox, a justice of the peace, by whom, after examination had, he was, on the 23d day of the same month, committed to the jail of the said county, in default of bail in the sum of \$800. That by virtue of the commitment issued by said justice, he was then unlawfully restrained of his liberty by said constable. That such commitment was issued under circumstances not allowed by law, there being before said justice no evidence, upon the examination and hearing, that any crime had been committed. Whereupon the writ of *habeas corpus* was issued by the court, and served on the said constable, Cutler, to which the following return was made by him, towit: That he had not the body of the said Goss in his custody, or under his power or restraint. That, before the service of the writ of *habeas corpus* was had upon him, he had the body of the said Goss in his custody and under his restraint, by the authority of a writ of commitment, to him directed, as the constable of said county of Leavenworth, which writ was issued by W. H. Fox, a justice of the peace of said county; by which writ of commitment he was commanded to commit the said Goss to the jail of said county, until he give a good and satisfactory bail in the sum of eight hundred dollars, or be otherwise discharged according to law. That while in his custody and under his restraint, by virtue of the said writ of commitment (which is attached hereto and shown to this court), by virtue of the power vested in him by law, he, the said Cutler, did approve of and accept a bail bond as offered by the said Goss, (which said bond is hereto attached and shown to the court) and did thereupon on the 23d day of June, 1860, permit the said Goss to go at liberty. And defendant further states that, at the time of the service of said writ of *habeas corpus*, he had no control over the body of the said Goss whatever, and he has not now, and, such being the case, he cannot bring the body of said Goss before this court, Dated June 26, 1860." Thereupon the case having been called for hearing, O. B. Holman, Esq., appeared on behalf of the accused, and Thomas F. Fenlon, Prosecuting-attorney for the county of Leavenworth, appeared for the territory; whereupon the attorney for Goss demurred to the return, of the constable, as insufficient in law to prevent the due effect of a writ as issued upon the petition of the relator. Among the papers of the case, making a part of the return of the constable, was the bail bond given by the prisoner Goss, with security, to the constable, duly approved and conditioned for the appearance of the prisoner at the next district court of Leavenworth county, on the 2nd day of August, 1860, to answer to any indictment which

may be found against him for perjury, etc., bearing date June 23, 1860. The attorney for Goss insisted upon a hearing of this case by the court on the merits, as presented by the return of the justice, proceedings and the evidence, and also contended that, in the original information and the commitment issued by the justice, there was no crime known to the law properly charged. The attorney for the prosecution contended that the return of the officer to the writ of *habeas corpus* was conclusive, showing that, at the time of the issuance of the writ of *habeas corpus* the prisoner was not in his custody, or in any way restrained of his liberty by him, having by his own act, in compliance with the law, released himself by giving bond, with security for his appearance at the next district court, to answer to the charge upon which he had been arrested. That he was not in court so as to be forthcoming for the purposes of this hearing as required by law, and therefore this court could take no legal cognizance of the matter. This being substantially the state of the case, as presented here, we will proceed to announce the opinion of the court upon it. * * *

(The court here proceeded to quote the terms of the territorial act regulating proceedings on writs of *habeas corpus*.)

Here we have, in specific terms, the statutory enactment in relation to the return which is required of the person or officer to whom the writ is directed. In the most unmistakable terms, throughout, it contemplates a confinement, custody and illegal restraint of the personal liberty of the person applying for the benefit of the writ—a custody of the body. That this is the true intent and meaning of the statute is manifest upon an examination of sections twenty-one, twenty-two, twenty-five, thirty-one, thirty-five, thirty-nine, forty-three and forty-eight of the act, all of which clearly contemplate a custody of the body, and a restraint of the liberty of the person of the petitioner, and the actual bringing of his body before the court or officer of the law by whom the writ was issued. This is the purpose of the law, and the object sought to be attained by the writ, that the person who is restrained of his liberty may be in, and (until the matter is judicially inquired into and disposed of) subject directly to, the powers of the judge or court, upon the decision of the court. If the imprisonment or restraint of his liberty be illegal, he may be, by the judge or court, before whom he has been brought, at once discharged in his or its presence, by the proper legal order; or, if to be let to bail, or remanded to prison, or kept in the absolute custody of the laws, the proper order therefore may be made in his presence. The law makes it the duty of the court or the judge, by operation of the writ to see that the party restrained of his liberty is actually brought before him, or it, in person, so that he may be in the direct power of the law of the case. If such were not the absolute requirement of the law the writ

would often be insufficient. In this case the response of the constable, by whom, it is alleged in the petition, the petitioner was illegally restrained of his liberty, is made in due compliance with the requirements of law. It shows that at the time of the service of the writ of *habeas corpus*, the petitioner was in the custody or power of the respondent, nor was he in any manner restrained of his liberty by him whatever, and that, previous to such service, the petitioner had voluntarily given bail to appear and answer to any indictment which might be found against him, at the next term of the district court, and thereupon he was released from custody, and all restraint of his liberty by respondent. Accompanying this return of the officer is the above mentioned bail bond, duly executed and approved. Here is also a state of the case which is clearly not within the operation of the provisions of the *habeas corpus* act, to which it does not apply. The restraint of liberty which, in contemplation of law, is legally made the subject of inquiry by the writ of *habeas corpus*, is more than a mere moral restraint. It is any duress or restraint of the person, whereby he is prevented from exercising the liberty of going when and where he pleases, whether it be by an officer of the law or a private individual. (Commonwealth v. Ridgway, 2 Ashmead 247; Hurd on *Habeas Corpus*, 210; Dodge's case, 6 Mart. Lou. Rep. 569.) It always (so far as we have known) has been held, by the courts and elementary writers on the subject, *that persons discharged on bail will not be considered as restrained of their liberty so as to be entitled to the writ of habeas corpus directed to their bail.* (1 Bouvier's Law Dictionary, 574; 3 Yeates' Rep. 263; 1 Serg. & R. 356.) In this case the return of the respondent, unless successfully traversed in fact, is conclusive, showing, in the first place, that, at the time of the service, of the writ of *habeas corpus*, the petitioner was not in his custody, or restrained of his liberty by him, and also showing that, by his own voluntary act, the petitioner had answered the demands of the commitment by virtue of which he had been in custody, by giving a bail bond, as required by law, to appear and answer to any indictment, which might be found against him at the next term of the district court of the proper county.

It is ordered by this court that the writ of *habeas corpus*, as issued in this case, be dismissed, together with all proceedings heretofore had thereon, and that the costs of this proceeding be paid by the petitioner.

In accord.—Spring v. Dahlman, 34 Neb. 692; Grice, *In re*, 79 Fed. 627; Branch, *Ex parte*, 36 Tex. Cr. App. 384; Ah Kee, *Ex parte*, 22 Nev. 374; *In re* Walker, 53 Miss. 366; Logan v. State, 3 Brev. (S. Car.) 415; Commonwealth v. Gill, 10 Pa. Co. Ct. R. 71; Lampert, *Ex parte*, 21 Hun (N. Y.), 154.

5. Detention on civil process.

EX PARTE RANDOLPH.

1833. UNITED STATES CIRCUIT COURT, DIST. OF VIRGINIA.
2 Brock, 447; 20 Fed., Cas. 242, No. 11,558.

* * * ROBERT B. RANDOLPH, late acting purser of the U. S. frigate *Constitution*, was brought into the court on a writ of *habeas corpus*, and a motion is now made for his discharge from imprisonment. The writ was directed to the marshal of this district, in whose custody he is. The return of the officer, shows the cause of caption and detention, to be a warrant issued by the accounting officers of the treasury, under authority of the act passed the fifteenth day of May, 1820; which, after reciting that Robert B. Randolph, late acting purser of the United States frigate *Constitution*, stands indebted to the United States in the sum of \$25,097.83, agreeably to the settlement of his account, made by the proper accounting officers of the treasury, and has failed to pay it over according to "the act for the better organization of the treasury department," commands the said marshal to make the said sum of \$25,097.83 out of the goods and chattels of the said Randolph; and in default thereof, to commit his body to prison, there to remain until discharged by due course of law. If these proceedings fail to produce the said sum of money, the warrant is to be satisfied out of his lands and tenements. The return shows that the body of the said Robert B. Randolph was committed to prison, and is detained by virtue of this process. * * *

(So much of the opinion as relates to the validity of the warrant issued by the Solicitor of the Treasury is omitted.)

BARBOUR, District Judge. * * * I have felt some difficulty upon the question, whether a *habeas corpus* could be sustained in favor of a party imprisoned under civil process, as in this case. The difficulty arose from the doubt expressed by two high authorities, although decided by neither. In *Ex parte Wilson*, 6 Cranch, (10 U. S. 52), the party was arrested by a *capias ad satisfaciendum* and was in prison bounds. An application was made for a *habeas corpus* on the ground, that the creditor had refused to pay his daily allowance. The court said that it was not satisfied that a *habeas corpus* was the proper remedy, in a case of arrest, under civil process. In *Cable v. Cooper*, 15 Johns. 152, the supreme court of New York, except one of the judges, express the same doubt, and refer to the case in Cranch. The judge, in delivering the opinion of the court, says, if it were necessary to decide the point, he should say, it would not lie in such a case.

I suppose that, probably, the doubt originated from this fact. The celebrated *habeas corpus* act of 31 Charles II, which, as

Judge Kent, in his commentaries, says, is the basis of almost all the American statutes on the subject, and which, in practice, by reason of its valuable provisions for insuring speedy action, has almost superseded the common law, has been held in England to be confined to criminal cases. All the judges of England in answer to a question propounded to them by the house of lords, answered, — That it did not extend to any case of imprisonment, detainer, or restraint whatsoever, except cases of commitment for criminal, or supposed criminal matters. 3 Bac. Abr. 438, note. At the same time, this question, in substance, was put to them: whether if a person imprisoned apply for a *habeas corpus ad subjiciendum*, at common law, and make affidavit that he does not believe that his imprisonment is by virtue of a commitment, for any criminal or supposed criminal matter, would such affidavit as the law then stood, be probable cause for awarding the writ? The question being objected to was not put. This would seem to leave the point in an unsettled state. Yet, there are two books of authority, which I think, sustain the doctrine that the writ is not confined to criminal matters. Blackstone in Volume 3, p. 132, says, that the great and efficacious writ in *all manner of illegal confinement* is the *habeas corpus ad subjiciendum*. Bacon (Volume 3, p. 421) says: Whenever a person is restrained of his liberty, by being confined in a common jail, or by a private person, *whether it be for a criminal or civil cause*, he may be regularly, by *habeas corpus*, have his body and cause, removed to some superior jurisdiction, etc.

Now, the act of congress, authorizes us to issue the writ, “for the purpose of inquiring into the cause of commitment.” Upon this, the supreme court in *Ex parte Watkins*, 3 Pet. (28 U. S.) 201, remarks: “that no law of the United States prescribes the cases in which this great writ shall be issued, nor the power of the court over the party brought up by it. The term is used in the Constitution as one which is well understood. This general reference to a power which we are required to exercise, without any precise definition of that power, imposes on us the necessity of making some inquiry into its use, according to that law, which is, in a considerable degree, incorporated in our own.” If, in making this inquiry, we were to consult the British statute alone, we should find it as already stated, confined in its construction, to criminal cases. But if we look to the common law authorities which I have mentioned, it seems to me, that we are justified in applying it to a civil process. Indeed we know it to have been repeatedly applied in England to the domestic relations of life, such as the liberation of a wife from the unjust restraint of a husband, and a child from that of parent. And certainly, we are well warranted in making this reference to the common law; because, although it is admitted by all, that it is not a source of jurisdiction, yet it is habitually, rightfully, nay

necessarily referred to for the definition and application of terms; indeed, there are many terms in the constitution, which could not otherwise be understood. Nor do even the doubts expressed in the cases from Cranch and Johnson apply to this; for both of those were on process of civil execution; issuing from a court of record and general jurisdiction; whereas, this is a case of process, issuing from a special jurisdiction which can neither be supervised by *certiorari*, nor re-examined by writ of error. In this case, then, if a *habeas corpus* would not lie, there would be no relief from imprisonment, without lawful authority. In cases of execution from courts of record, the courts themselves can quash it, if it do not conform to the judgment; if it do, and that judgment be erroneous, it can be corrected in a court of appellate jurisdiction. Upon the whole view of the subject, I am of the opinion that the party should be discharged.

(Opinion of MARSHALL, Circuit Justice, omitted.)

In accord.—Cazin, *In re*, 56 Vt. 297; Commonwealth v. Moore, 36 Mass. 339; Hyde v. Jenkins, 6 La. 435; People v. Willett, 15 How. Pr. (N. Y.) 210; Hecker v. Jarrett, 3 Bin. (Pa.) 404; State v. Ward, 8 N. J. L. 120; Davis, *Ex parte*, 18 Vt. 401; Brainard, *In re*, 56 Vt. 495.

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6. Discretion in granting the writ and necessity of showing probable cause.

STATE EX REL. WALKER, ATTORNEY-GENERAL v. DOBSON, JUDGE.

1896. SUPREME COURT OF MISSOURI. 135 Mo. 1.

SHERWOOD, J.—One of the judges of this division, at the instance of the attorney general, issued a writ of *certiorari*, directed to respondent, commanding that he certify to this division of this court, a certain petition for a writ of *habeas corpus*, filed before him by Foster Pollard, and Frank Harris, together with all such other papers which were on file in such proceeding, or of record therein.

Complying with our said writ, in obedience thereto, the respondent did certify to this court the petition aforesaid and all accompanying papers, etc., on inspection whereof we entered a judgment and order quashing said *habeas corpus* proceedings, and now, as is proper, we proceed to give the reasons which dictated our said action.

The petition presented to the circuit court praying for the writ of *habeas corpus*, after stating that petitioners are unlawfully deprived of their liberty by Keshlear, marshal of the criminal court of Kansas City, Missouri, proceeds to state in substance and effect the following matters, towit:

That petitioners are unlawfully deprived of their liberty, etc.; that said imprisonment is illegal because petitioners were held by Walls, justice of the peace, to answer to the grand jury for the crime of manslaughter, and required to give bail in the sum of \$1500, to answer to that charge, when without any dismissal of the charge of manslaughter, petitioners were indicted for the crime of murder in the first degree; that the grand jury which found the indictment was not summoned and selected according to law; that the indictment is insufficient in law because it does not charge that petitioners were guilty in any degree of murder, the indictment consisting of allegations necessary to prove the crime of murder in the first degree; that the names of all the witnesses before the grand jury were not indorsed upon the indictment; that petitioners were not able at the time of the trial to procure the evidence they desired; that they were convicted on perjured testimony, and have recently discovered the means of proving this; that petitioners are not guilty of the crime charged against them, and can prove it; that they are under sentence of death to be executed May 15, 1896; that the court had no jurisdiction of the persons of the petitioners, nor of the offense charged against them, etc., etc.

The following is the return to the writ of *certiorari*:

"In obedience to the within writ I herewith return and cause to be transmitted to the clerk of the supreme court the original petition and all the papers in and pertaining to the matter of *habeas corpus* referred to in said writ. Also a certified copy of the order of the Jackson county circuit court, entered of record in said cause, as fully as the record and files remain before me.

I further return and certify that the writ of *habeas corpus* referred to was issued by me about seven o'clock of the evening of May 14, after a conference with my associates on the circuit bench of the sixteenth judicial circuit, and with their consent and approval, both as to the time fixed for the return of the said writ, as well as for the issuance of the same. My associates referred to are Judge Edward L. Scarritt, presiding in Division No. 1; Judge James H. Slover, presiding in division No. 2; and Judge John W. Henry presiding in division four of the said circuit court at Kansas City, and each and all of said judges were invited, and expected, to sit at the hearing upon the return of the said writ. I further return and certify that it was distinctly understood between myself and the attorney for the petitioners, that, if they were not remanded into custody, they would, under no circumstances be discharged until the Supreme Court of Missouri should pass upon any questions the circuit court might find to be involved."

"Given under my hand this May 16, 1896.

"CHARLES L. DOBSON,
"Judge Sixteenth Judicial Circuit."

The first question for determination is the sufficiency of the petition for the issuance of the writ prayed for by petitioners and granted by the circuit judge.

It is to be remarked of the petition that it signally fails to conform to any known rule of pleading applicable to cases of this sort. Portions of it consist of mere legal conclusions; the residue of inconsequential statements which do not in any manner tend to affect or impair the jurisdiction of the trial court. As is observed by an author of acknowledged merit: "The application for a writ of *habeas corpus* should put before the court or judge facts enough to permit an intelligent judgment to be formed of the case. The rules of good pleading should be followed. Conclusions of law should be avoided. The petition should show in what the illegality consists, and this should be done by stating the facts showing it, as contradistinguished from a mere statement of the conclusion from the facts. Upon his petition for a *habeas corpus* the relator must state in his petition the cause of his detention, or for what offense he was arrested, if any, and set out a copy of the warrant of commitment, or make affidavit that the jailer refused to give him a copy." Church, *Hab. Corp.* (2d ed.) sec. 91, and cases cited.

Section 5346 of the *habeas corpus* act makes similar requirements because it declares that the petition for the writ "must state * * * all the facts concerning the imprisonment or restraint, and the true cause thereof; * * * and, if the imprisonment be alleged to be illegal, the petition must also state in what the illegality consists." Here the petition states the fact of imprisonment, but not the cause thereof.

And section 5347 requires that a copy of the warrant accompany the petition or an excuse be given for its absence, and there is no such averment nor excuse. Elsewhere it has been ruled under a section identical with the one just quoted, that by that portion of it which recites that "if the imprisonment is illegal," etc., the statute contemplates that the facts showing wherein the alleged illegality consists should be stated. *Ex parte Deny*, 10 Nev. 212.

In the case before us the petition does not state nor pretend to state "all the facts concerning the imprisonment and the true cause thereof." There is not even an illusion to those facts or to the cause of detention contained in the petition. And where the statute requires a certain allegation in an application of this kind, the absence of such allegation is a fatal defect. *People ex rel. v. Cowles*, 59 How. Pr. 287.

And with regard to the alleged insufficiency of the indictment, the original, which accompanies the papers herein, and presumably was filed with the petition for *habeas corpus*, shows an instrument

valid in every respect on its face. This amply refutes the allegations made as to its invalidity.

But for reasons to be now stated, we need not pause to inquire whether the indictment was valid or not; whether the grand jury which presented it was properly summoned or not; whether the names of all the witnesses were indorsed on the indictment; whether the defendants therein were able to procure the evidence they desired; whether they were convicted on perjured testimony, nor whether they were guilty of the crime charged against them, nor whether they can prove this.

All these things are, however, urged, to show, and as a means of showing, that the court (what court is not stated) had no jurisdiction of the subject matter or of the persons of the petitioners, or the offense charged against them, which latter matters are simply the statements of legal conclusions. It is however stated that the petitioners are under sentence of death; from this it must be presumed that judgment had been rendered against them by the criminal court of Jackson county, Missouri, inasmuch as they are said to be in the custody of the marshal of that court. And as pleadings are to be taken most strongly against the pleader, as courts of this state take judicial notice of the existence and jurisdiction of all the courts in this state and as sentence of death is the customary accompaniment and result of a judgment of a court possessed of criminal jurisdiction, the petition for *habeas corpus* in effect alleges that petitioners have had rendered against them for the crime of murder in the first degree a judgment and sentence of death by the criminal court of Jackson county, a court of competent jurisdiction, and this is the basis on which they ask to be discharged on *habeas corpus*, because they claim that the court had no jurisdiction of the subject matter, etc., for the reasons stated in the petition as already set forth.

Section 5379, however, of the *habeas corpus* act, declares: "But no court, under the provisions of this chapter, shall * * * have power to inquire into the legality or justice of any * * * judgment * * * of any court legally constituted." That the criminal court of Jackson county is a court of general jurisdiction as to all criminal prosecutions, and therefore "legally constituted," is a matter of judicial notice.

Now all the authorities hold that a petition asking the relief petitioners seek, must on its face show, "probable cause," and when it appears from the party's own showing that there is no ground *prima facie* for his discharge, the court will not issue the writ. In short, the writ of *habeas corpus* is a writ of right, but not a writ of course. That cause must be shown, is apparent as well from the authorities as from the language of section 5346, requiring that the petition "must state all the facts concerning the

imprisonment or restraint, and the true cause thereof;" apparent also, from the language of section 5348 requiring that the writ be granted without delay "unless it appear, from the petition itself, or the documents annexed, that the party can neither be discharged nor admitted to bail, nor in any other manner relieved under the provisions of this chapter." The issuance of the writ is not a mere perfunctory operation. It is not to be had for the asking. It is intended as a relief alone against unlawful imprisonment; and no imprisonment is unlawful when the process is a justification of the officer. *Com. ex rel. v. Lucky*, 1 Watts, 67.

Judicial discretion is as necessary in the issuance of the writ as in the issuance of any other writ whatsoever. It can only properly issue to one entitled to it either under the common law or under the statute. Were this otherwise, the writ would descend from its high plane, and its issuance become a mere ministerial act which could be performed by a clerk of a court as well as a judge.

Prior to the year 1820, an erroneous opinion was prevalent that the court was bound to issue the writ as a matter of course and at all events, without using its discretion in determining the sufficiency of the grounds on which the writ was prayed. Since then, however, all the later rulings, both in England and in America, establish that a statement of facts showing probable cause must precede the obtaining of the writ, whether it be granted at common law or under the statute. Sometimes, the court to avoid the vain and nugatory issuance of the writ, will grant a rule *nisi* at the outset, to show cause why the writ should not issue; and will not go through the barren formality of issuing the writ, when the inevitable result would be the remanding of the prisoner. These views it scarcely needs saying are supported by abundant authority. *Sim's case*, 7 Cush. 285; *Watkin's case*, 3 Pet. 201; *Church, Hab. Corp.* (2d ed.) sec. 92, and other cases there cited.

In the case at bar, not only is there an entire failure to show probable cause why the writ should issue, but on the contrary thereof, it is to be inferentially, but substantially, gathered from the petition that the petitioners are held by virtue of a judgment rendered against them, sentence of death pronounced against them, and a warrant for their execution issued and in the hands of the marshal. With some of these facts actually, the residue virtually, apparent on the face of the petition, a *prima facie* case was made out against petitioners and probable cause that they were lawfully restrained of their liberty, and that too, by the judgment of a "court legally constituted," since the circuit judge who granted the writ was bound to take judicial notice that the court rendering the judgment was legally constituted, organized and established, and had general jurisdiction over all criminal cases, and was therefore bound to presume the correctness of its action in the given case.

Section 5379 already quoted, is only declaratory of the familiar principle that a judgment of a court of competent jurisdiction cannot be defeated or overthrown by a collateral attack. And the same rule prevails regarding a judgment assailed by the issuance of a writ of *habeas corpus* rendered in a criminal cause, by a court of general criminal jurisdiction, as in the case of an attack collaterally made upon a judgment rendered, in similar circumstances in a civil action.

Now nothing is better established than that the writ of *habeas corpus* possesses none of the attributes or performs any of the functions of the writ of error, or an appeal, or *certiorari*. Brown, Jurisdict. section 104; Church, Hab. Corp. sec. 196. By it no mere error occurring at or prior to the trial, can be reviewed, retried or relitigated. Mere errors or irregularities which occur antecedent to, or during the progress of, the trial, cannot abate the force and effect of the judgment of a court of competent jurisdiction; nor be investigated by *habeas corpus*. Thus, after conviction and judgment, the courts on *habeas corpus* will not inquire into the legality of the grand jury, how it was summoned, etc.; nor can the sufficiency of the evidence on which the prisoner was convicted be investigated, nor the facts thereof retried or the evidence reviewed; nor will the prisoner be permitted to disprove the charge on which he was found guilty, nor can a defective indictment, one which would be held bad on demurrer, be investigated, nor made the subject of further inquiry or review. The writ of *habeas corpus* is not framed to retry issues of fact or review the proceedings of a legal trial, however irregular or erroneous. Church, Hab. Corp. (2d ed.) secs. 367 a, 348, 350, 362, 297, 196, 246, 87, 236, 363, 73, and cases cited; Brown, Jurisdict., sec. 104.

"If a criminal charge is colorable; or "sufficient to set the judicial mind in motion," or to call upon it to act; or make some approach toward charging a criminal offense; or intimates the facts necessary to constitute the offense and a purpose to declare thereon; or tends to show a criminal offense, no matter how informal or defective; or has a legal tendency to prove each requirement of the statute, it will shield the proceedings from collateral attack." Van Fleet, Coll. Attack, sec. 304. *In a word, no errors or irregularities, not going to the question of jurisdiction, are reviewable on habeas corpus. Ibid.*

And as to jurisdiction, every court in this state is bound to take judicial notice of the fact that the criminal court of Jackson County has a general jurisdiction to deal with criminal causes; so that when a judgment of that court is brought in question respecting any given case of that class, it will be presumed that it had jurisdiction of the person tried, as well as jurisdiction of the subject

matter, towit, over that class of cases, the latter a jurisdiction conferred by law and, therefore, a matter of judicial notice.

Judge Cooley says, "It is not to be assumed that a court of general jurisdiction has in any case proceeded to adjudge upon matters over which it had no authority; and its jurisdiction is to be presumed, whether there are recitals in its record to show it or not." Const. Lim. (6th ed.) 500.

Speaking of the difference between courts of general and those of limited jurisdiction, and of the conclusive presumptions attendant on the acts and adjudications of the former, Mr. Justice Baldwin says: "A court which is competent by its constitution to decide on its own jurisdiction, and to exercise it to a final judgment, without setting forth in their proceedings the facts and evidence on which it is rendered, whose record is absolute verity, not to be impugned by averment or proof to the contrary, is of the first description; there can be no judicial inspection behind the judgment save by appellate power." *Grignon's Lessee v. Astor*, 2 How. 319, *loc cit.* 341.

In *Ex parte Watkins*, 3 Pet. 193, Chief Justice Marshall when speaking of the conclusive effect of judgments of courts of general jurisdiction, said: "An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous. The circuit court of the District of Columbia is a court of record, having general jurisdiction over criminal matters. An offense cognizable in any court is cognizable in that court. If the offense be punishable by law, that court is competent to inflict the punishment. The judgment of such a tribunal has all the obligation which the judgment of any tribunal can have. To determine whether the offense charged in the indictment be legally punishable or not, is among the most unquestionable of its powers and duties. The decision of this question is the exercise of jurisdiction, whether the judgment be for or against the prisoner. The judgment is equally as binding in the one case as in the other; and must remain in full force unless reversed by a superior court capable of reversing it. * * * The question whether any offense was or was not committed, that is, whether the indictment did or did not show that an offense had been committed, was a question which that court was competent to decide. If its judgment was erroneous * * * still it is a judgment, and, until reversed, cannot be disregarded. 3 Pet. *loc. cit.* 203 and 206."

On this subject of attacking a judgment collaterally, on *habeas corpus*, it has been ruled in Georgia that: After a judgment of conviction for felony has been affirmed by the supreme court on writ of error brought by the convict, the legality of his conviction

cannot be drawn in question by a writ of *habeas corpus* sued out by him, or by another person in his behalf, save for the want of jurisdiction appearing on the face of the record as brought from the court below to the supreme court. Such affirmance implies that he was tried by a court of competent jurisdiction legally constituted, and nothing to the contrary can be shown otherwise than by an inspection of the record. *Daniels v. Towers*, 79 Ga. 785.

It will be noted that the petition for the writ herein makes no pretense that the criminal court did not have jurisdiction in murder cases or over the persons of defendants, but claims that it did not have such jurisdiction because of defects in the indictment; defective summoning of the grand jury; perjured testimony, etc.; all of which as already seen, do not abate, in any respect the jurisdiction of the court over the subject matter, to wit, its right and authority to try criminal cases, nor its jurisdiction over the persons of petitioners.

But it is unnecessary to extend this discussion further, not to multiply authorities which declare a very familiar principle.

This record then presents a case where a petition which fails to comply with statutory provisions and requirements the most obvious; which fails to state probable cause; which does not make out a *prima facie* case; which indubitably and by inevitable inference shows that a judgment has been rendered against the petitioners in a court legally constituted and where the indictment plainly charges murder in the first degree; where the petition expressly states that they are under sentence of death; and yet on this petition thus drawn, and in disregard of an express statutory declaration that "no court shall have power to inquire into the legality or justice of any judgment of any court legally constituted," and in disregard of familiar principles enunciated by all the authorities, the writ of *habeas corpus* has been granted, and the petitioners brought before the court which caused it to issue.

What was the object and purpose of its issuance? Was it to go through the idle ceremony of bringing the petitioners before the respondent and then remanding them, or was it in order to have witnesses summoned; reopen and try anew the issues of fact and of law already adjudged and determined by the solemn adjudication of a court of competent jurisdiction, a judgment afterward affirmed by this court? Or did the writ issue merely to have witnesses summoned, take their testimony and thus show that the wrong result had been reached on the trial had and the adjudication made and then remand the prisoners?

It matters not what the purpose was or the object in view. In any event the issue of the writ was in disregard of the plainest statutory provisions and prohibitions, and was the establishment of a precedent, most dangerous in its tendencies and innovations,

and one not to be contemplated without the gravest apprehensions. Just look at it! If such a proceeding as this is to be tolerated, after a man has been duly tried and convicted of murder, and judgment rendered and that judgment affirmed in this court, and the day of his execution set, any probate or county judge in the state, may, if the trial has happened in his county, interpose with a *habeas corpus*; retry the case on the merits; impeach the judgment of the trial court, and discharge the prisoner, if in his opinion this be the correct thing to do. The fact that in this instance, the writ has been issued by a judge of a circuit court, a court of general jurisdiction, does not alter the complexion of the case in the least, because after all the sole question to be answered is: Does the power exist anywhere in this state thus collaterally to impeach the judgments of the courts of competent jurisdiction, and thus to thwart the judgments and mandates of this court? We are not of opinion that any such power or jurisdiction exists or has any foundation either in statutory law or in legitimate precedents.

Besides, granting the existence of a general jurisdiction in respondent to issue writs of *habeas corpus*, still that jurisdiction never attached in this particular case; was not put in motion by reason of the fact that such allegations as the statute requires to be made in the petition as the basis for the issuance of the writ in sections 5346 and 5347, were not made; the rule being that when "the law conferring the power on the court to act in the matter requires the allegation of a particular fact to exist as a condition to its exercising its power, such fact must be averred for this refers to and circumscribes the power of the court to act except upon the existence of such fact." Brown, Jurisdict. sec 1. And such general jurisdiction was never set in motion, because, further, it is apparent on the face of the petition, that the parties could neither be discharged nor admitted to bail, nor in any manner relieved. Section 5348.

But perhaps it may be said that section 5402, of the *habeas corpus* act, provides a penalty of not exceeding \$1000, in favor of any party aggrieved, where a court or magistrate refuses the writ. This is a grievous misapprehension of that section, because by the very terms of that section, the penalty can be exacted only when the writ may "lawfully issue," and when it may lawfully issue is determined by prior sections of the same chapter.

Moreover, it is proper to say just here, that the penalty provision has its original in the statute of 31 Car. II. Possibly parliament had the power to provide and enforce a penalty in the circumstances mentioned; but as under the express provisions of article 3 of our state constitution which divides the powers of government into three distinct departments, the legislative, executive and judicial, and forbids either of these departments to exercise

any of the powers properly belonging to the others, "except in the instances in this constitution expressly directed or permitted," the legislature of this state has in our opinion no power to provide a penalty for a judge or court simply because a writ of *habeas corpus* is denied, which denial is based upon an honest endeavor to discharge what is believed to be the demands of recognized and imperative judicial duty. If the legislature may go further than this, then it can destroy the independence of the judiciary, and punish a judge because he, after due deliberation, denies any other writ, or honestly enters or renders any merely erroneous order or judgment.

On this point it is very forcibly said by Mr. Justice Brewer: "Nothing is more important, in any country, than an independent judiciary; and no where is it so important, so absolutely essential, as under a popular government. No man can be a good judge who does not feel perfectly free to follow the dictates of his own judgment wheresoever they may lead him." And in a country where * * * popular clamor is apt to sway the multitude, nothing is more important than that the judges shall be kept as independent as possible. And it is universal experience, and the single voice of the law books, that one thing essential to their independence is that they should not be exposed to a private action for damages for anything that they may do as judges." *Cooke v. Bangs*, 31 Fed. Rep. 640; see also 1 Jaggard, Torts, pp. 120, 121; *Bradley v. Fisher*, 13 Wall 335. * * *

(Remainder of opinion relating to *certiorari* as a proper writ to review such proceedings, is omitted.)

Order that the proceedings in *Habeas Corpus* below be quashed.

THOMAS SIM'S CASE.

1851. SUPREME JUDICIAL COURT OF MASSACHUSETTS. 61 Mass. 285.

SHAW, C. J.—This is a petition for a writ of *habeas corpus* to bring the petitioner before this court, with a view to his discharge from imprisonment, upon the grounds stated in the petition. We were strongly urged to issue the writ, without inquiry into its cause, and to hear an argument upon the petitioner's right to a discharge, on the return of the writ. This we declined to do, on grounds of principle, and common and well settled practice. *Before a writ of habeas corpus is granted, sufficient probable cause must be shown; but when it appears upon the party's own showing that there is no sufficient ground prima facie for his discharge, the court will not issue the writ.* And on a slight recurrence to the cases we are of

the opinion that this is the established rule and practice at common law. Indeed the ordinary course is, for the court applied to, to grant a rule *nisi* in the first instance, to show cause why the writ should not issue. Of course, if sufficient cause is shown, the rule will be withheld. Blake's case, 2 M. & S. 428; The King v. Marsh, 3 Bulst. 27; And in Hobhouse's case, 3 B. & Ald. 420, the question came before the court and was fully discussed. It was there considered that, whether the writ of *habeas corpus* were claimed at common law or under the statute, a proper ground ought to be laid before the court, previously to granting the writ. It is not granted as a matter of course; and the court will not grant the writ of *habeas corpus* when they see that, in the result, they must remand the party. The court in that case, which was a commitment by the house of commons, had granted the writ in the first instance, upon an urgent claim that it was a matter of right, and some colorable authority cited in support of it, and on its return stated the reasons why it should not have been done.

We think that the same rule and practice have prevailed in this country. In Watkin's case, 3 Pet. 201, Marshall, C. J., said: "the writ ought not to be awarded, if the court is satisfied the prisoner would be remanded." Indeed, by necessary implication, it is the fair result of the provisions of the *habeas corpus* act of this commonwealth. The Rev. Stats. c. III. § 3, require, in all cases of an application for the writ of *habeas corpus*, that the party imprisoned, or some person in his behalf, shall present a petition, and if held under legal process, or color or pretence of legal process, shall annex a copy of the process, under which the respondent claims to hold and detain him, or make proof by affidavit, that a copy of such writ or warrant, has been applied for and refused. But why annex a copy of the process unless it be to enable the court to form an opinion whether the party is rightfully held in custody or not; and why form an opinion in that stage of the proceeding, if it is to constitute no ground for judicial action? It is urged that this is a writ of right, and therefore grantable without inquiry. *But it is not a writ of right in that narrow and technical sense; if it were, the issuing of it would be a mere ministerial act, and the party claiming it might go to the clerk, and sue it out, as he may a writ on a claim for land or money. It is a writ of right in a larger and more liberal sense; a right to be delivered from all unlawful imprisonment.* Nor does this limit or restrain the full and beneficial operation of the writ, so essential to the preservation of personal liberty. The same court must decide whether the imprisonment complained of is illegal; and whether the inquiry is had, in the first instance, on the application, or subsequently on the return of the writ, or partly on the one and partly on the other, it must depend on the same facts and principles, and

be governed by the same rules of law. It was upon these grounds that we stated upon the presentation of a similar petition, that no sufficient cause appeared upon the petition for granting the writ; and upon a further consideration we now repeat, that when it appears on the party's own showing in the petition, that if brought before the court, he would not be entitled to a discharge, the court will not issue the writ. * * *

(So much of the opinion as relates to the legality of the detention is omitted.)

See also *People v. Bradley*, 60 Ill. 390; *Campbell, Ex parte*, 20 Ala. 89; *Bentley v. Terry*, 59 Ga. 555; *Watkins, Ex parte*, 3 Pet. (U. S.) 193; *People v. Mayer*, 16 Barb. (N. Y.) 362; *O'Malia v. Wentworth*, 65 Me. 129; *Semler's case*, 41 Wis. 517; *Hoskins v. Baxter*, 64 Minn. 226; *Ainsworth, Ex parte*, 27 Tex. 731; *Williamson's Case*, 26 Pa. St. 155.

7. *Habeas Corpus*, a civil proceeding.

EX PARTE TOM TONG.

1883. SUPREME COURT OF THE UNITED STATES. 108 U. S. 556.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This is a writ of *habeas corpus* sued out of the Circuit Court of the United States for the District of California by the petitioner, Tom Tong, a subject of the emperor of China, for the purpose of an inquiry into the legality of his detention by the chief of police of the city and county of San Francisco, for an alleged violation of an ordinance or order of the board of supervisors of such city and county regulating the licensing, etc., of public laundries, and the case comes here, before judgment below, on a certificate of division of opinion between the judges holding the court as to certain questions which arose at the hearing. The allegation in the petition is that the order, for the violation of which the petitioner is held, is in violation and contravention of the Constitution of the United States and of a treaty between the United States and the Emperor of China.

A question which meets us at the outset is whether we have jurisdiction, and that depends on whether the proceeding is to be treated as civil or criminal. Section 650 of the Revised Statutes provides that whenever, in any civil suit or proceeding in the circuit court, there appears a difference of opinion between the judges holding the court as to any matter to be decided, ruled or ordered, the opinion of the presiding judge is to prevail and be considered the opinion of the court for the time being; and section 652, that

when final judgment or decree is rendered, the points of disagreement shall be certified and entered of record under the direction of the judges. That being done, the judgment or decree may, under the provisions of section 693, be brought here for review by writ of error or appeal, as the case may be.

By section 651, it is provided that whenever any question occurs on the trial or hearing of any criminal proceeding before a circuit court, and the judges are divided in opinion, the point on which they disagree shall, during the same term, upon the request of either party, or of their counsel, be stated under the direction of the judges, and certified under the seal of the court to this court at its next session.

It follows from these provisions of the statutes, that, if this is a civil suit or proceeding, we have no jurisdiction, as there has been no final judgment in the circuit court, but, if it is a criminal proceeding, we have.

The writ of *habeas corpus* is the remedy which the law gives for the enforcement of the civil right of personal liberty. Resort to it sometimes becomes necessary, because of what is done to enforce laws for the punishment of crimes, *but the judicial proceeding under it is not to inquire into the criminal act which is complained of, but into the right to liberty notwithstanding the act.* Proceedings to enforce civil rights are civil proceedings, and proceedings for the punishment of crimes are criminal proceedings. In the present case the petitioner is held under criminal process. The prosecution against him is a criminal prosecution, but the writ of *habeas corpus* which he has obtained is not a proceeding in that prosecution. On the contrary, it is a new suit brought by him to enforce a civil right which he claims, as against those who are holding him in custody, under the criminal process. If he fails to establish his right to his liberty, he may be detained for trial for the offence; but if he succeeds he must be discharged from custody. The proceeding is one instituted by himself for his liberty, not by the government, to punish him for his crime. The petitioner claims that the constitution of the United States and a treaty of the United States give him the right to his liberty, notwithstanding the charge that has been made against him, and he has obtained judicial process to enforce that right. Such a proceeding on his part, is in our opinion, a civil proceeding, notwithstanding his object is, by means of it, to get released from custody, under a criminal prosecution. It was said by Chief Justice Marshall, speaking for the court, as long ago *Ex parte Bollman* & Swarthwout, 4 Cranch, 75-101:

"The question whether the individual shall be imprisoned is always distinct from the question whether he shall be convicted or

acquitted of the charge on which he is tried, and therefore these questions are separated, and may be decided in different courts."

The questions that may be certified to us on a division of opinion before judgment are those which occur on the trial or hearing of a criminal proceeding before a circuit court. It follows that we cannot take jurisdiction of the case in its present form, and it is consequently

Remanded to the circuit court for further proceedings according to law.

See also *Kline v. Kline*, 57 Iowa, 386; *Barker, In re*, 56 Vt. 1; *People v. Dewey*, 23 Misc. (N. Y.) 267; *Reynolds, In re*, (U. S. Dist. Court), 20 Fed. Cas. 592.

8. Reviewing questions of fact on *Habeas Corpus*.

EX PARTE KAUFMAN.

1881. SUPREME COURT OF MISSOURI. 73 Mo. 588.

NORTON, J.—This is a proceeding by *habeas corpus* in which Amos S. Kaufman, the petitioner, alleges he is illegally restrained of his liberty in the state penitentiary by the warden thereof. The warden in his return avers that, at the April term, 1881, of the criminal court within and for Pettis county, said petitioner was convicted of larceny in a dwelling house, in said county, and by the judgment of the court was sentenced to confinement in the penitentiary for the term of two years, a copy of which sentence and judgment he files with his return as his authority for holding the petitioner. The said judgment of said criminal court, under which defendant is held, being a final judgment rendered by a court having jurisdiction of such matters, our duty in the premises is prescribed by section 2648, Revised Statutes 1879, which provides that in proceedings by *habeas corpus*, the court or magistrate before whom the case is pending, shall "forthwith remand the party, if it shall appear that he is detained in custody by virtue of the final judgment, order or decree of any competent tribunal of criminal or civil jurisdiction." Under this plain provision of the statute, which interprets itself, it is our duty to remand the petitioner, which is hereby done.

The only ground urged upon us for the discharge of the petitioner, is based upon the alleged fact, and for the first time here asserted, that the petitioner, at the time of his conviction, was under the age of eighteen years, and was not, therefore, liable to be sentenced to confinement in the penitentiary. As this fact does not appear in the record, and was not made known in the *nisi*

prius court, we know of no law which would authorize us to try the question as to whether the fact asserted is true or not. The duty of trying this question belonged to the court where the trial of the petitioner was pending, and in which the judgment was rendered, and the petitioner should have given that court opportunity of performing the duty by raising the question of non-age there, instead of undertaking to have it investigated here. *State v. Gavner*, 30 Mo. 44; *Ex parte Toney*, 11 Mo. 661. An order will be made remanding the petitioner and dismissing the writ, in which all concur.

IN RE HENRY.

1895. SUPREME COURT OF NEW YORK. 13 Misc. R. 734; 35 N. Y. Supp. 210.

GAYNOR, J.—The petitioner sues out the writ of *habeas corpus* claiming to be illegally deprived of his liberty by the sheriff of Kings County. That officer makes return to the writ that he holds him under a commitment of Henry F. Haggerty, Esq., a police justice of the City of Brooklyn. The commitment recites that the petitioner is held under an order of commitment to answer a charge of murder in the first degree, made by the said magistrate after examination. The petitioner traverses the return, by alleging that no evidence was given before the magistrate tending to show that the petitioner committed the said crime.

There is such a diversity of opinion by text writers and judges in respect of whether such a commitment is conclusive, or whether on the contrary, inquiry may go behind it upon the writ of *habeas corpus*, to ascertain whether the committing magistrate had any evidence before him upon which to make it, that I shall state what I concluded while at the bar and still believe the rule in this state to be. The question is one of jurisdiction in the magistrate. The jurisdiction of magistrates is limited. They may not arbitrarily commit one to answer a charge of crime. If an accused demand an examination, the magistrate may not commit him to answer to a court having cognizance of the crime, unless it "appear that a crime has been committed, and that there is sufficient cause to believe the defendant guilty thereof." Cr. Code, § 208. It is not necessary that the evidence be conclusive or sufficient to secure a conviction upon the trial. It may be less than that. In fine, if there be any evidence that the accused committed the crime, it is sufficient. If there be no such evidence, then the magistrate is without jurisdiction to commit him. The present inquiry, therefore, is whether there was any evidence before the magistrate,

that the accused committed the crime; for that is the test of his jurisdiction. Church, Hab. Cor. § 236. The petitioner having alleged in his traverse that there was no such evidence, the burden was upon him to show that to be the case. To do so, he put in evidence all the testimony taken before the magistrate. I have therefore to read it, and determine whether it contains any evidence that the accused committed the crime.

The accused lived with his father and mother, old people. He had no occupation and was addicted to the drinking habit. He and the mother were on bad terms with the father, and there were quarrels. The father was comparatively wealthy. They left the house on Saturday with the avowed purpose of taking legal proceedings to have the father and his property put in charge of a committee. They did not return. On Monday they consulted a lawyer, but he advised them that their wish to have the father declared a lunatic or incompetent, so as to have a committee appointed, could not be carried out. They went that night to the residence of the other son, Walter, at Flatbush, and spoke with him on the same subject. The father left alone at home, was seen in and out by the neighbors as late as Wednesday. Walter called there and saw him about 5.30 o'clock Wednesday evening. The next morning about seven o'clock, the accused was seen by a neighbor hurrying from the house. That day the blinds of the house were not opened. The son Walter called at 5.30 and 8.30 that evening, and again on Friday morning but could not get in. He called again Friday afternoon, and, finding the house still closed, he notified the police, and entrance being obtained by an upper window, the father was found dead in the basement hall. He had been murdered by many gashes and blows upon the head. No entrance to the house was found. It was securely closed as for the night. The accused surrendered himself on Saturday, and was questioned by the police. He had slept, Sunday, Monday and Tuesday nights at an hotel in New York City, and had in his possession about \$30 on Sunday. He denied that he had been at his father's house on Thursday morning. He accounted for Wednesday night by saying that he had stayed in Prospect Park. He had a cut on the right wrist. He first said he got it cleaning the range, and then by catching on a nail getting over the fence of Prospect Park, when ordered out by a policeman. The right sleeve of his white shirt was water-stained, from recent washing. An expert cut out several pieces of it and upon test, found in each corpuscles of human blood. These are some of the facts. From them the magistrate was, in the exercise of due judicial prudence and discretion, warranted in concluding that there was probable cause to believe that the accused was guilty of the deed. There is some evidence favorable to the accused, and it may be said that the evidence against him is not conclusive. But the law does allow me to weigh the evi-

dence; pro and con, to form an opinion of guilt or innocence. The sole question is whether there was any evidence upon which the magistrate could make the order of commitment. I think there was. The writ is dismissed and the prisoner remanded.

Writ dismissed and prisoner remanded.

See also *State v. Farlee*, 1 N. J. L. 41; *Bird, Ex parte*, 19 Cal. 130; *Zelle v. McHenry*, 51 Iowa, 572; *Commonwealth v. Chandler*, 11 Mass. 83; *Bresee, In re*, 82 Iowa, 573; *Ex parte Rickelt*, 61 Fed. 203; *Ex parte Champion*, 52 Ala. 311; *State v. Scott*, 43 La. Ann. 857; *Taylor, In re*, 5 Cow (N. Y.), 39; *State v. Doty*, 1 Miss. 230; *In re Snell*, 31 Minn. 110; *Benson v. State*, 124 Ala. 92.

Section 2.— Courts issuing the writ.

1. The Federal Courts.

See Chapter XIII, Sections 751-766 inclusive, Revised Statutes of the United States.

EX PARTE HUNG HANG.

1883. SUPREME COURT OF THE UNITED STATES. 108 U. S. 552.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This is an application for a writ of *habeas corpus* for the purpose of an inquiry into the legality of the detention of the petitioner, Hung Hang, a subject of the Emperor of China, by the chief of police, under a warrant for his arrest, issued by the police judge of the city and county of San Francisco, California, for a violation of an order or ordinance of the board of supervisors of such city, and county, alleged to be in contravention of a treaty and of the constitution of the United States.

It has long been settled that ordinarily this court cannot issue a writ of *habeas corpus* except under its appellate jurisdiction. *Ex parte Bollman & Swartwout*, 4 Cranch 75; *Ex parte Watkins*, 7 Pet. 568; *Ex parte Yerger*, 8 Wall. 85; *Ex parte Lange*, 18 Wall. 163; *Ex parte Parks*, 93 U. S. 18; *Ex parte Virginia*, 100 U. S. 339; *Ex parte Siebold*, *id.* 371.

Section 751 of the revised statutes, which re-enacts a similar provision in the judiciary act of 1789 (sec. 14), gives this court authority to issue the writ, but except in cases affecting ambassadors, other public ministers or consuls, and those in which a state is a party, it can only be done for the review of a judicial decision of some inferior officer or court. This petition presents no such case.

The writ is consequently denied.

EX PARTE MIRZAN.

1887. SUPREME COURT OF THE UNITED STATES. 119 U. S. 584.

THIS was a motion for leave to file a petition for a writ of *habeas corpus*. The allegations were that the petitioner was a citizen of the United States temporarily residing in Alexandria, in Egypt, in the Ottoman Dominions, in 1880; that while there at that time he was accused of the murder of one Alexander Dahon in Alexandria; that by direction of the then Secretary of State, Horace Maynard, Esq., the then minister of the United States at Constantinople, proceeded to Alexandria for the purpose of presiding at his trial on that accusation; that he was arraigned before Mr. Maynard on a criminal information presented by Geo. O. Bachellor, and held to answer for a capital crime without presentment or indictment by a grand jury, and without a trial by a jury or any person except the minister; that he was convicted and, by the said minister, was sentenced to death; that thereafter by order of the President of the United States he was removed from the Ottoman Dominions to the penitentiary at Albany in the State of New York, that he was at the time of the motion held in custody and deprived of his liberty, in said penitentiary under color of the authority of the United States; that during all these times it was a time of peace, and not time of war or public danger; and that the case did not arise in the land or naval forces or in the militia of the United States nor was the petitioner at any time in such forces or militia. The petition alleged that all these acts took place without warrant of law, and were void, and in violation of the constitution and laws of the United States, and of the rights of the petitioner as a citizen of the United States, for various reasons which were set forth at length in the petition. The prayer of the petition was as follows:

"Wherefore your petitioner prays that the writ of *habeas corpus* do issue from this court, directed to John McEwen, the warden of the penitentiary of the State of New York at Albany, commanding him on a day certain therein to be named, to bring before this court the body of the petitioner, together with the cause of his detention, and to abide such further orders as your honors and this court may direct.

"And your petitioner further prays that each, every, and all the proceedings aforesaid, and the sentence aforesaid, may be declared by this court to be null and void; and that the petitioner be released and discharged from the custody and imprisonment in which he is now held by color of the authority of the United States."

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This motion is denied. As since the act of March 3, 1885, 23 Stats. 437, an appeal lies to this court from the judgments of the circuit court in *habeas corpus* cases, this court will not issue such a writ, even if it has the power—about which it is unnecessary now to express an opinion—in cases where it may as well be done in the proper circuit court, if there are no special circumstances in the case making direct action or intervention by this court necessary or expedient. In this case there are no such special circumstances, and the application may as well be made to the circuit court for the northern district of New York as here. Our right to exercise this discretion is shown by the principles on which the decisions in *Ex parte Royall*, Nos. 1 and 2, 117 U. S. 241, and *Ex parte Royall*, 117 U. S. 254, rest. This practice was suggested by us and followed in *Wales v. Whitney*, 114 U. S. 564.

Denied.

EX PARTE ROYALL.

1886. SUPREME COURT OF THE UNITED STATES. 117 U. S. 241.

MR. JUSTICE HARLAN delivered the opinion of the court.

These cases come here under the act of Mar. 3, 1885, Ch. 353, 23 Stats. 437, which so amends section 764 of the revised statutes as to give this court jurisdiction, upon appeal, to review the final decision of the circuit courts of the United States in certain specified cases, including that of a writ of *habeas corpus* sued out in behalf of a person alleged to be restrained of his liberty in violation of the Constitution.

The first question to be considered is whether the circuit courts have jurisdiction on *habeas corpus* to discharge from custody one who is been restrained of his liberty in violation of the National Constitution, but who, at the time, is held under state process, for trial on an indictment charging him with an offence against the laws of the state.

The statutory provisions which control the determination of this question are found in the following sections of the revised statutes:

"Sec. 751. The Supreme Court and the Circuit and District Courts shall have the power to issue writs of *habeas corpus*.

"Sec. 752. The several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of restraint of liberty.

"Sec. 753. The writ of *habeas corpus* shall in no case extend to

the case of a prisoner in jail, unless he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law or treaty of the United States, or of an order, process or decree of a court or judge thereof; or is in custody in violation of the Constitution, or of a law or treaty of the United States; or being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection or exemption claimed under the commission or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify.

"Sec. 754. Application for the writ of *habeas corpus* shall be made to the court, or justice or judge authorized to issue the same, by complaint in writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known. The facts set forth in the complaint shall be verified by the oath of the party making the application.

Sec. 755. The court, or justice or judge to whom the application is made, shall forthwith award a writ of *habeas corpus*, unless it appears from the petition itself that the party is not entitled thereto. The writ shall be directed to the person in whose custody the party is detained."

"Sec. 761. The court or justice or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."

It was further provided that, pending the proceedings on *habeas corpus* in cases mentioned in §§ 763-764, which include an application for the writ by a person alleged to be restrained of his liberty in violation of the Constitution of the United States—and, "until final judgment therein, and, after final judgment of discharge any proceeding against the person so imprisoned, or confined or restrained of his liberty, in any state court, or by or under the authority of any state, for any matter so heard or determined, or in process of being heard and determined, under such writ of *habeas corpus*, shall be deemed null and void." § 766.

The grant to the circuit courts in § 751 of jurisdiction to issue writs of *habeas corpus*, is in language as broad as could be well employed. While it is attended by the general condition, necessarily implied, that the authority conferred must be exercised agreeably to the principles and usages of law, the only express limitation imposed is, that the privilege of the writ shall not be employed by—or, rather,

that the courts and the judicial officers named, shall not have the power to award the writ to—any prisoner in jail, except in specified cases, one of them being where he is alleged to be held in custody in violation of the constitution. The latter class of cases was first distinctly provided for by the act of Feb. 5, 1867, Ch. 28, 14 Stat. 385, which declares that the several courts of the United States, and the several justices and judges thereof within their respective jurisdictions, in addition to the authority then conferred by law, “shall have power to grant writs of *habeas corpus*, in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States.” Whether therefore, the appellant is a prisoner in jail, within the meaning of section 753, or is restrained of his liberty by an officer of the law, executing the process of a court of Virginia, in either case it being alleged under oath that he is held in custody in violation of the constitution, the circuit court has, by the express words of the statute, jurisdiction on *habeas corpus* to inquire into the cause for which he is restrained of his liberty, and to dispose of him “as law and justice require.”

It may be suggested that the state court is competent to decide whether the petitioner is or is not illegally restrained of his liberty; that the appropriate time for the determination of that question is at the trial of the indictment; and that his detention for the purpose simply of securing his attendance at the trial ought not to be deemed an improper exercise by that court of its power to hear and decide the case. The first of these propositions is undoubtedly sound; for in *Robb v. Connolly*, 111 U. S. 624, 637, it was held upon full consideration, that “a state court of original jurisdiction, having the parties before it, may, consistently with existing federal legislation, determine cases at law or in equity, arising under the constitution and laws of the United States, or involving rights dependent upon such constitution or laws;” and that “upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce and protect, every right granted or secured by the constitution of the United States, and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them.” But with respect to the other propositions, it is clear that, if the local statute under which Royall was indicted, be repugnant to the constitution, the prosecution against him has nothing upon which to rest, and the entire proceeding against him is a nullity. As was said in *Ex parte Siebold*, 100 U. S. 371, 376, “An unconstitutional law is void, and is as no law. An offence created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment.” So in *Ex parte Yarbrough*, 110 U. S. 651, 654, it is said that if the statute prescribing the offence for which Yarbrough and his asso-

ciates were convicted was void, the court which tried them was without jurisdiction, and they were entitled to be discharged. It would seem—whether reference be had to the act of 1867 or to existing statutory provisions—that it was the purpose of congress to invest the courts of the Union, and the justices and judges thereof, with power upon writs of *habeas corpus*, to restore to liberty any person, within their respective jurisdictions, who is held in custody, by whatever authority, in violation of the constitution or any law or treaty of the United States. The statute evidently contemplated that cases might arise when the power thus conferred should be exercised, during the progress of proceedings instituted against the petitioner in a state court, or by or under the authority of a state, on account of the very matter presented for determination by the writ of *habeas corpus*; for care is taken to provide that any such proceedings, pending the hearing of the case upon the writ and until final judgment and after the prisoner is discharged, shall be null and void. If such were not the clear implication of the statute, still, as it does not except from its operation cases in which the applicant for the writ is held in custody by the authority of a state, acting through its judiciary or by its officers, the court could not, against the positive language of congress, declare any such exception, unless required to do so by the terms of the constitution itself. But as the judicial power of the nation extends to all cases arising under the constitution, the laws and treaties of the United States; as the privilege of the writ of *habeas corpus* cannot be suspended unless when in cases of rebellion or invasion the public safety may require it; and as congress has power to pass all laws necessary and proper to carry into execution the powers vested by the constitution in the government of the United States or in any department or officer thereof; no doubt can exist as to the power of congress to thus enlarge the jurisdiction of the courts of the Union and of their justices and judges. That the petitioner is held under the authority of a state cannot affect the question of the jurisdiction of the circuit court to inquire into the cause of his commitment, and to discharge him if he is restrained of his liberty in violation of the Constitution. The grand jurors who found the indictment, the court into which it was returned and by whose order he was arrested, and the officer who holds him in custody, are all, equally with individual citizens, under a duty from the discharge of which the state could not release them, to respect and obey the supreme law of the land, “anything in the constitution and laws of the state to the contrary notwithstanding.” And that equal power does not belong to the courts and judges of the several states; that they cannot, under any authority conferred by the States, discharge from custody persons held by authority of the courts of the United States, or of commissioners of such courts, or by

officers of the general government, acting under its laws, results from the supremacy and laws of the United States. *Ableman v. Booth*, 21 How. 506; *Tarble Case* 13 Wall. 397; *Robb v. Connolly*, 111 U. S. 624.

We are, therefore, of the opinion that the circuit court has jurisdiction upon writ of *habeas corpus* to inquire into the cause of appellant's commitment, and to discharge him if he be held in custody in violation of the constitution.

It remains, however, to be considered, whether the refusal of that court to issue the writ and take the accused from the custody of the state officer can be sustained upon any other ground than that upon which it proceeded. If it can be, the judgment will not be reversed because an insufficient reason may be assigned for the dismissal of the petitions.

Undoubtedly the writ should be forthwith awarded, "unless it appears from the petition itself that the party is not entitled to it" and the case summarily heard and determined "as law and justice require." Such are the express requirements of the statute. If, however, it is apparent upon the petition, that the writ issued ought not, on principles of law and justice, to result in the immediate discharge of the accused from custody, the court is not bound to award it as soon as the application is made. *Ex parte Watkins*, 3 Pet. 193, 201; *Ex parte Milligan*, 4 Wall. 2, 111. What law and justice may require, in a particular case, is often an embarrassing question to the court or to the judicial officer before whom the petitioner is brought. It is alleged in the petitions—neither one of which is accompanied by a copy of the indictment in the state court, nor accompanied by any statement why such copy was not obtained—that the appellant is held in custody under process of a state court, in which he stands indicted for an alleged offense against the laws of Virginia. It is stated in one case that he gave bail, but was subsequently surrendered by his sureties. But it is not alleged and it does not appear, in either case, that he is unable to give security for his appearance in the state court, or that reasonable bail is denied him, or that his trial will be unnecessarily delayed. The question as to the constitutionality of the law under which he is indicted must necessarily arise at his trial under the indictment, and it is one upon which as we have seen, it is competent for the state court to pass. Under such circumstances does the statute imperatively require the circuit court, by writ of *habeas corpus*, to wrest the petitioner from the custody of the state officers in advance of his trial in the state court? We are of the opinion that while the circuit court has power to do so, and may discharge the accused in advance of his trial, if he is restrained of his liberty in violation of the constitution, it is not bound in every case to exercise such a power immediately upon application being made for

the writ. We cannot suppose that congress intended to compel those courts by such means, to draw to themselves in the first instance, the control of all criminal prosecutions commenced in the state courts exercising the authority within the same territorial limits, where the accused claims that he is held in custody in violation of the constitution of the United States. The injunction to hear the case summarily, and thereupon, "to dispose of the party as law and justice require" does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the constitution. When the petitioner is in custody by the state authority for an act done or omitted to be done in pursuance of a law of the United States, or of an order, process or decree of a court, or judge thereof; or where, being a subject or citizen of a foreign state, and domiciled therein, he is in custody, under like authority, for an act done or omitted to be done under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; in such and like cases of urgency, involving the authority and operations of the general government, or the obligations of this country to, or its relations with, foreign nations, the courts of the United States have frequently interposed by writs of *habeas corpus* and discharged prisoners who were held in custody under state authority. So, also when they are in the custody of a state officer, it may be necessary by use of the writ, to bring them into a court of the United States to testify as witnesses. The present cases involve no such considerations. Nor do their circumstances as detailed in petitions, suggest any reason why the state court of original jurisdiction may not, without interference on the part of the courts of the United States, pass upon the constitutionality of the statutes under which the appellant is indicted. The circuit court was not at liberty, under the circumstances disclosed, to presume that the decision of the state court would be otherwise than is required by the fundamental law of the land, or that it would disregard the settled principles of constitutional law announced by this court, upon which is clearly conferred the power to decide ultimately and finally all cases arising under the constitution and laws of the United States. In *Taylor v. Carryl*, 20 How. 583, 595, it was said to be a recognized portion of the duty of this court—and we will add of all other courts, National and State—"to give preference to such principles and

methods of procedure as shall serve to conciliate the distinct and independent tribunals of the States of the Union, so that they may co-operate as harmonious members of a judicial system co-extensive with the United States, and submitting to the paramount authority of the same constitution, laws and Federal obligations." And in *Covell v. Heyman*, 111 U. S. 176, 182, it was declared "that the forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States it is something more. It is a principle of right and of law, and, therefore, of necessity."

That these salutary principles may have full operation, and in harmony with what we suppose was the intention of Congress in the enactments in question, this court holds that where a person is in custody, under process from a state court of original jurisdiction, for an alleged offence against the laws of such state, and it is claimed that he is restrained of his liberty in violation of the constitution of the United States, the circuit court has a discretion, whether it will discharge him, upon *habeas corpus*, in advance of his trial in the court in which he is indicted; that discretion, however, to be subordinated to any special circumstances requiring immediate action. When the state court shall have finally acted upon the case, the circuit court has still a discretion whether, under all the circumstances then existing, the accused, if convicted, shall be put to his writ of error from the highest court of the state, or whether it will proceed, by a writ of *habeas corpus*, summarily to determine whether the petitioner is restrained of his liberty in violation of the constitution of the United States. The latter was substantially the course adopted in *Ex parte Bridges*, 2 Woods, 428. The prisoner was indicted and convicted in one of the courts of Georgia for perjury committed in an examination before a United States commissioner under what is known as the enforcement act of congress. He was discharged upon *habeas corpus* sued out before Mr. Justice Bradley, upon the ground that the state court had no jurisdiction of the case, the offence charged being one which, under the laws of the United States, was exclusively cognizable in the Federal Courts. Adverting to the argument that where a defendant has been regularly indicted, tried and convicted in a state court, his only remedy was to carry the judgment to the state court of last resort, and thence by writ of error to this court, he said: "This might be so if the proceeding in the state court was merely erroneous; but where it is void for want of jurisdiction, *habeas corpus* will lie, and may be issued by any court or judge invested with supervisory jurisdiction in such case. *Ex parte Lange*, 18 Wall. 163." It was further ob-

served in the same case, that while it might appear unseemly that a prisoner, after a conviction in a state court, should be set at liberty by a single judge in *habeas corpus*, there was no escape from the act of 1867, which invested such judge with power to discharge when the prisoner was restrained of his liberty in violation of a law of the United States.

As it does not appear, that the circuit court might not, in its discretion and consistently with law and justice, have denied the applications for the writ at the time they were made, we are of the opinion that the judgment in each case must be affirmed, but without prejudice to the right of the petitioner to renew his applications to that court at some future time should the circumstances render it proper to do so.

Affirmed.

On the jurisdiction of the Federal Courts to issue writs of *habeas corpus* see article by R. H. Curtis, 12 Crim. Law Mag. 193.

See also King v. McLean Asylum, 64 Fed. 331; Reinitz, *In re*, 39 Fed. 204; United States v. Lewis, 129 Fed. 823; Yung Jon, *Ex parte*, 28 Fed. 308; Yerger, *Ex parte*, 8 Wall. (U. S.) 85; Siebold, *Ex parte*, 100 U. S. 371; Barry, *In re*, 42 Fed. 113.

ROBB v. CONNOLLY.

1884. SUPREME COURT OF THE UNITED STATES. III U. S. 624.

ON the 20th day of November, 1883, one C. H. Bayley, was arrested in the city of San Francisco, California, and delivered to W. L. Robb, who had been empowered by the Governor of the State of Oregon to take and receive him from the proper authorities of the state of California, and convey him to the former state, to be there dealt with according to law. * * *

Bayley sued out a writ of *habeas corpus* from the judge of the superior court for the city and county of San Francisco, directed to Robb, and commanding him to have the body of the petitioner before said judge, together with the time and cause of his detention, etc. His application for the writ proceeded upon the ground that the imprisonment and detention were illegal, in that "no copy of an indictment found or affidavit made, before a magistrate, charging petitioner with any crime, was produced to the Governor of California," and consequently, that the warrant of arrest was issued without compliance with the Acts of Congress.

Robb made return that he held Bayley "under the authority of the United States, "as evidence whereof he produced a copy of the warrant of the Governor of California, with his commission from the Governor of Oregon, authorizing him to take and receive the

prisoner as a fugitive from justice. He refused "to produce said C. H. Bayley, on the ground that, under the laws of the United States, he ought not to produce said prisoner, because the honorable superior court has no power or authority to proceed in the premises." For this refusal—the court finding that the body of the petitioner could be produced—Robb was adjudged guilty of contempt of court, and by order of the judge he was arrested by the sheriff, and committed to jail until he "obeys said writ and produced the body of the said C. H. Bayley," or "until he be otherwise legally discharged." He thereupon sued out a writ of *habeas corpus* from the Supreme Court of California. His application proceeded upon the ground that Bayley was in his custody "under and by virtue of the authority of the United States, and that said superior court had no jurisdiction to proceed in the premises, and his (Robb's) imprisonment is contrary to the law of the United States and in excess of the jurisdiction of said court." Upon hearing the writ was dismissed, and Robb remanded to the custody of the sheriff.

"It is no part of our duty" said the Supreme Court of California, "to decide whether the authority under which Robb holds the prisoner Bayley is sufficient or not. Neither is it incumbent on us to decide whether Bayley is held under the authority of the United States, and if so, how far it is competent for the court below to inquire into the legality of the proceedings under which he is held. Whether an affidavit or indictment must accompany the requisition or not; whether the recitals in the governor's warrant of arrest are conclusive or simply *prima facie* evidence of the facts they recite, all these are authorities for the consideration of the court issuing the writ, and before whom the prisoner is to be brought. The only inquiry in this case relates to the power of the court below to compel the production of the body of the prisoner before it, so that the cause of this imprisonment and detention can be inquired into, and on this point we have no doubt. It was not the duty of the court issuing the writ, nor was it obliged to accept as true, the return of the party. It was within the jurisdiction of the court, at least, to inquire into the facts of the case and the alleged cause of detention, and to this end it was proper that the prisoner should be brought into the presence of the court, in obedience to the command of the writ, whereupon the prisoner would have had a right to traverse the return, *People v. Donohue*, 84 N. Y. 438; *People v. Brady*, 56 *id.* 182; *Norris v. Newton*, 5 McLean 92; *State v. Schlemm*, 4 Harr. (Del.) 577. This the petitioner refused to do, and by such refusal was guilty of a contempt of the court."

From such judgment dismissing the writ and remanding Robb to the custody of the sheriff, he prosecuted this writ of error.

MR. JUSTICE HARLAN delivered the opinion of the court. He stated the facts in the foregoing language, and continued:

For the purpose of giving effect to the second section of the article four of the Constitution of the United States, declaring that "a person charged in any state with treason, felony or other crime, who shall flee from justice and be found in another state, shall on the demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime." Congress passed the act of Feb. 12. 1793, in relation to fugitives from justice. 1 Stat. 302. The provisions of its first and second sections have been re-enacted in sections 5278 and 5279 of the Revised Statutes, which are as follows:

"Sec. 5278. Whenever the executive authority of any state or territory demands the person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony or other crime certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and cause notice of the arrest to be given to the executive authority making such demand or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appear, within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing and transmitting such fugitive to the state or territory making such demand, shall be paid by such state or territory.

"Sec. 5279. Any agent so appointed who receives the fugitive into his custody, shall be empowered to transport him to the state or territory from which he has fled. And every person, who by force, sets at liberty, or rescues the fugitive from such agent while so transporting him, shall be fined not more than \$500 or imprisoned not more than one year."

The penal code of California, in conformity with the constitution of that state, provides, in reference to the superior court of the city and county of San Francisco, that "said court and their judges, or any of them, shall have power to issue writs of mandamus, *certiorari*, prohibition, *quo warranto*, and *habeas corpus*, on petition by or on behalf of any person in actual custody in their respective counties."

The authority and duty of the judge of that court to issue a writ of *habeas corpus* upon Bayley's application is not disputed in argument. But the contention of the plaintiff in error is, that in receiving and holding Bayley for the purpose of transporting him to Oregon, he was and is, acting under the authority and executing

the power of the United States; and, therefore, that neither the superior court of San Francisco, nor one of its judges, could legally compel him to produce the prisoner, or commit him as for contempt for refusing to do so. If that court was without jurisdiction by reason of the paramount authority of the constitution and laws of the United States to compel the plaintiff in error in response to the *habeas corpus* to produce the prisoner, then his committal for contempt was the denial of a right, privilege and immunity, secured by the supreme law of the land. The claim by the plaintiff in error that there was such a denial constitutes the foundation of our jurisdiction.

It is contended that the principles announced in *Ableman v. Booth*, and *United States v. Booth*, 21 How. 506, and in *Tarble's case* 13 Wall. 397, sustain the refusal of the plaintiff in error to produce the prisoner. The soundness of this position will be the subject of our first inquiry.

In *Ableman v. Booth*, the general question was as to the authority of a justice of the supreme court of Wisconsin, upon a writ of *habeas corpus* to compel a marshal of the United States to produce the body of one, committed to his custody by an order of a commissioner of a circuit court of the United States for failing to give bail for his appearance in the district court of the United States for that State, to answer a charge of having violated the provisions of the fugitive slave act of September 18, 1850. In other words, a judge of the supreme court of the state claimed and exercised the right to supervise and annul the proceedings of that commissioner, and to discharge a prisoner committed by him for an offence against the laws of the general government. In *United States v. Booth*, the question was as to the authority of a justice of the supreme court of the same state, upon a writ of *habeas corpus*, to discharge one in custody under a judgment of the district court of the United States in which he had been indicted for an offence against the laws of the United States, and by which he had been sentenced to be imprisoned for the term of one month, to pay a fine of \$1,000, and costs of prosecution, and to remain in custody until the sentence was complied with. The authority claimed by the justice who issued the writ and discharged the prisoner was affirmed by the supreme court of that state, and hence, as was said, the state court claimed and exercised jurisdiction over the proceedings and judgment of a district court of the United States, and upon a summary and collateral proceeding, by *habeas corpus*, set aside and annulled its judgment, and discharged a prisoner who had been tried and found guilty of an offence against the laws of the United States, and sentenced to imprisonment by the district court. 21 How. 513, 514.

It was held that no such paramount power existed in any state

or her tribunals, since its existence was inconsistent with the supremacy of the general government, as defined and limited by the constitution of the United States and the laws made in pursuance thereof, and could not be recognized without bringing within the control of the states the entire criminal code of the United States, including all offences from the highest to the lowest, involving imprisonment as a part of the imprisonment inflicted. While the sovereignty of the state within its territorial limits to a certain extent was conceded, that sovereignty, the court adjudged, was so limited and restricted by the supreme law of the land, that the sphere of action appropriated to the United States was as entirely beyond the reach of judicial process issued by a state judge or a state court, as the proceedings in one of the states were beyond the reach of the process of the judicial tribunals of another state.

"We do not question," said this court, "the authority of a state court, or judge, who is authorized by the laws of the state, to issue the writ of *habeas corpus*, to issue it in any case where the party is imprisoned within its territorial limits, provided *it does not appear, when the application is made, that the person imprisoned is in custody, under the authority of the United States*. The court or judge has a right to inquire, in this mode of proceeding, for what cause and by what authority the prisoner is confined within the territorial limits of the state sovereignty. And it is the duty of the marshal, or other person having the custody of the prisoner, to make known to the judge or court, by a proper return, the authority by which he holds him in custody. This right to inquire by process of *habeas corpus*, and the duty of the officer to make a return, grows, necessarily, out of the complex character of our government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each, within its sphere of action prescribed by the constitution of the United States, independent of the other. But after the return is made, and the state judge or court judicially apprised that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of *habeas corpus*, nor any other process issued under state authority, can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offence against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and give him redress. And, although, as we have said, it is the duty of the marshal or other person holding him, to make known, by a proper return, the authority under which he detains him, it is at the same time imperatively his duty, to obey the process of

the United States, to hold the prisoner in custody under it, and to refuse obedience to the mandate or process of any other government. And, consequently, it is his duty, not to take the prisoner, or suffer him to be taken, before a state judge or court upon a *habeas corpus* issued under state authority. No state judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or to require him to be brought before them. And if the authority of a state, in the form of judicial process or otherwise, should attempt to control the marshal or other authorized officer or agent of the United States, in any respect, in the custody of his prisoner, it would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of law against illegal interference. No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued; and an attempt to enforce it beyond these boundaries is nothing less lawless violence." 21 How. 523

Before considering the scope and effect of that decision, it is proper to examine Tarble's case, 13 Wall. 397, which is, also, relied upon to support the proposition that the judge of the state court was without jurisdiction to compel the plaintiff in error to produce the body of the alleged fugitive from justice. In that case the question was whether a judicial officer of a state, or a commissioner of a state court, had jurisdiction, upon *habeas corpus*, to inquire into the validity of the enlistment of soldiers in the military service of the United States, and to discharge them from such service, when, in his judgment, their enlistment had not been made in conformity with law. "It is evident," said the court, "if such jurisdiction may be exercised by any judicial officer of a state, it may be exercised by the court commissioner within the county for which he is appointed; and if it may be exercised with reference to soldiers that are detained in the military service of the United States, whose enlistment is alleged to have been illegally made, it may be exercised with reference to persons employed in any other department of the public service when their illegal detention is asserted. It may be exercised in all cases where parties are held under the authority of the United States, whenever the invalidity of the exercise of that authority is affirmed. The jurisdiction, if it exist at all, can only be limited in its application by the legislative power of the state. It may even reach to parties imprisoned under sentence of the National courts, after regular indictment, trial and conviction, for offences against the laws of the United States." 13 Wall. 402. The grounds of the decision in *Ableman v. Booth*, and *United States v. Booth* were fully examined, and the conclusion reached is indicated in the following extract from

the opinion: "State judges and state courts authorized by the laws of their states to issue writs of *habeas corpus* have undoubtedly the right to issue the writ in any case where a party is alleged to be illegally confined within their limits, unless it appear, upon his application, that he is confined under the authority or claim and color of the authority, of the United States, by any officer of that government. If such fact appear upon the application such writ should be refused. If it do not appear, the judge or court issuing the writ has a right to inquire into the cause of imprisonment, and ascertain by what authority the person is held within the limits of the state; and it is the duty of the marshal, or other officer having the custody of the person, to give, by a proper return, information of this respect." *Ib.* 409. Alluding to the fact that the language used in *Ableman v. Booth* and *United States v. Booth* had been construed by some as applying only to cases where a person is held in custody under the undisputed lawful authority of the United States, as distinguished from his imprisonment under mere claim and color of such authority, the court rejected any such limitation upon the decisions in those cases, and said: "All that is meant by the language used is, that the state judge or state court should proceed no further when it appears, from the application of the party, or the return made, that the prisoner is held by an officer of the United States under what, in truth, purports to be the authority of the United States; that is, an authority, the validity of which is to be determined by the constitution and laws of the United States. If a party thus held be illegally imprisoned, it is for the courts or judicial officers of the United States, and those courts and officers alone, to grant him release." *Ib.* 411. It was adjudged that the state court commissioner was without jurisdiction to issue the writ for the discharge of the prisoner in that case, because it appeared upon the application presented for the writ, that "the prisoner was held by an officer of the United States, under claim and color of the authority of the United States, as an enlisted soldier mustered into the service of the national government; and the same information was imparted to the commissioner by the return of the officer."

From this review of former decisions, it is clear that the question now presented has never been determined by this court. In *Ableman v. Booth*, the prisoner as we have seen, was held in custody by an officer of the United States, under a warrant of commitment from a commissioner of the circuit court of the United States, for an offence against the laws of the general government. In *United States v. Booth*, he was in custody in pursuance of a judgment of a court of the United States founded upon an indictment charging him with an offence against the laws of the United States. In *Tarble's case*, the person whose discharge was sought was held

as an enlisted soldier of the army, by an officer of that army directly under the constitution and laws of the United States.

No such questions are presented here, unless it be, as claimed, that the plaintiff in error is, within the principles of former adjudications, an officer of the United States, wielding the authority and executing the power of the nation. We are all of opinion that he was not such an officer but was and is simply an agent of the state of Oregon, invested with authority to receive in her behalf, an alleged fugitive from the justice of that state. By the very terms of the statute under which the executive authority of Oregon demanded the arrest and surrender of the fugitive, he is described as "the agent of such authority." It is true that the executive authority of the state in which the fugitive has taken refuge, is under a duty imposed by the Constitution and laws of the United States, to cause his surrender upon proper demand by the executive authority of the state from which he has fled. It is equally true that the authority of the agent of the demanding state to bring the fugitive within its territorial limits, is expressly conferred by the statutes of the United States, and, therefore, while so transporting him, he is, in a certain sense, in the exercise of an authority derived from the United States. But these circumstances do not constitute him an officer of the United States, within the meaning of former decisions. He is not appointed by the United States and owes no duty to the national government, for a violation of which he may be punished by its tribunals or removed from office. His authority, in the first instance, comes from the state in which the fugitive stands charged with the crime. He is, in every substantial sense, her agent, as well in receiving the custody of the fugitive, as in transporting him to the state, under whose commission he is acting. What he does, in execution of that authority, is to the end that the violations of the laws of his state may be punished. The fugitive is arrested and transported for an offence against her laws, not for an offence against the United States. The essential difference, therefore, between the cases heretofore determined, and the present one, is that in the former, the judicial authorities of the state claimed and exercised the right, upon *habeas corpus*, to release persons held in custody in pursuance of a judgment of a court of the United States, or by an order of a circuit court commissioner, or by officers of the United States, in execution of their laws; while, in the present case, the person who sued out the writ was in custody of an agent of another state, charged with an offence against her laws.

Underlying the entire argument in behalf of the plaintiff in error is the idea that the judicial tribunals of the states are excluded altogether from the consideration and determination of questions involving an authority, or a right, privilege or immunity,

derived from the constitution and laws of the United States. But this view is not sustained by the statutes defining and regulating the jurisdiction of the courts of the United States. In establishing those courts, congress has taken care not to exclude the jurisdiction of the state courts from every case to which by the constitution the judicial power of the United States extends. In the judiciary act of 1879 it is declared that the circuit courts of the United States shall have original cognizance, "concurrent with the courts of the several states," of all suits of a civil nature, at common law or in equity, involving a certain amount, in which the United States are plaintiffs or petitioners, or an alien is a party, or the suit is between the citizen of the state where the suit is brought and a citizen of another state. By section 711 of the Revised Statutes of the United States, as amended by the act of Feb. 11, 1875, jurisdiction exclusive of the courts of the several states, is vested in the courts of the United States of all crimes and offences cognizable under the authority of the United States; of all suits for penalties and forfeitures incurred under their laws; of all civil causes of admiralty and maritime jurisdiction; of seizures under the laws of the United States, on land or on waters not within the admiralty and maritime jurisdiction; of all cases arising under the patent or copyright laws of the United States; of all matters and proceedings in bankruptcy; and of all controversies of a civil nature where a state is a party, except where it is between a state and its citizens, or between a state and the citizens of another state, or aliens; the jurisdiction of the states remaining unaffected in all other cases to which the judicial power of the United States may be extended. And by the act of March 3, 1875, the original jurisdiction of the circuit courts of the United States is enlarged so as to embrace all suits of a civil nature, at common law or in equity, involving a certain amount arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states, or a controversy between citizens of the same state claiming lands under grants of different states, or a controversy between citizens of a state, and foreign states, citizens or subjects. But it is expressly declared that in such cases their jurisdiction is "concurrent with the courts of the several states"—the jurisdiction of the latter courts, being of course, subject to the right to remove the suit into the proper court of the United States, at the time and in the mode prescribed, and to the appellate power of this court, as established and regulated by the constitution and laws of the United States. So, that a state court of original jurisdiction, having the parties before it, may, consistently with existing Federal legislation, determine cases at law or in equity, arising under the

constitution or laws of the United States, or involving rights dependent upon such constitution or laws. Upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce and protect every right granted or secured by the constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them; for the judges of the state courts are required to take an oath to support that constitution, and they are bound by it, and the laws of the United States made in pursuance thereof, and all treaties made under their authority, as the supreme law of the land, "anything in the constitution or laws of any state to the contrary notwithstanding." If they fail therein, and withhold or deny rights, privileges or immunities secured by the constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the state in which the question could be decided to this court for final and conclusive determination.

The recognition, therefore, of the authority of a state court, or of one of its judges, upon writ of *habeas corpus*, to pass upon the legality of the imprisonment, within the territory of that state, of a person held in custody—otherwise than under the judgment or orders of the judicial tribunals of the United States, or by the order of a commissioner of a circuit court, or by officers of the United States acting under their laws—cannot be denied merely because the proceedings involved the determination of rights, privileges or immunities derived from the nation, or require a construction of the constitution and laws of the United States. Congress has not undertaken to invest the judicial tribunals of the United States with exclusive jurisdiction of issuing writs of *habeas corpus* in proceedings for the arrest of fugitives from justice and their delivery to the authority of the state in which they stand charged with crime. When a demand has been made, in accordance with the constitution of the United States, by the state from which the fugitive has fled, upon the executive authority of the state in which he is found, that instrument, indeed, makes it the duty of the latter to cause his arrest and surrender to the executive authority of the demanding state, or to the agent of such authority. But if it should appear upon the face of the warrant issued for the arrest of the fugitive, that such demand was not accompanied or supported by a copy, certified to be authentic, of any indictment found against the accused, or of any affidavit made before a magistrate of the demanding state, charging the commission by him, of some crime in the latter state, could it be claimed that the arrest of the fugitive would be in pursuance of the acts of congress, or that the agent of the demanding state, had authority from the United States to receive and hold him to be transported to that state?

This question could not be answered in the affirmative, except upon the supposition, not to be indulged, that, so far as the constitution and legislation of congress are concerned, the transporting of a person beyond the limits of a state in which he resides, or happens to be, to another state, depends entirely upon the arbitrary will of the executive authorities of the state demanding and of the state surrendering him. Whether the warrant of arrest, issued by the governor of California, for the arrest of Bayley, appeared, upon its face, to be authorized and required by the act of Congress; that is, whether, upon its face, a case was made behind which the state courts or officers could not go, consistently with the constitution and laws of the United States, are questions upon which it is unnecessary to express an opinion. What we decide—and the present case requires nothing more—is, that, so far as the constitution and laws of the United States are concerned it is competent for the courts of the state of California, or for any of her judges—having power, under her laws, to issue writs of *habeas corpus*, to determine, upon writs of *habeas corpus*, whether the warrant of arrest and the delivery of the fugitive to the agent of the state of Oregon, were in conformity with the statutes of the United States; if so, to remand him to the custody of the agent of the State of Oregon. And, since the fugitive was not, at the time the writ in question issued, in the custody of the United States, by any of their tribunals or officers, the court or judge issuing it did not violate any right or privilege, or immunity secured by the constitution and laws of the United States in requiring the production of the body of the fugitive upon the hearing of the return to the writ, to the end that he might be discharged if, upon hearing, it was adjudged that his detention was unauthorized by the act of congress providing for the arrest and detention and surrender of fugitives from justice, or by the laws of the state in which he was found. The writ was without value or effect unless the body of the accused was produced. Subject, then, to the exclusive and paramount authority of the national government, by its own judicial tribunals, to determine whether persons held in custody by authority of the courts of the United States, or by the commissioners of such courts, or by officers of the general government, acting under its laws, are so held in conformity with the law, the states have the right, by their own courts, or by the judges thereof, to inquire into the grounds upon which any person, within their respective territorial limits, is restrained of his liberty, and to discharge him, if it be ascertained that such restraint be illegal; and this, notwithstanding such illegality may arise from a violation of the constitution and laws of the United States.

It is proper to say that we have not overlooked the recent elaborate opinion of the learned judge of the circuit court of the United

States for the district of California in the case of *In re Robb*, 19 Fed. Rep. 26. But we have not been able to reach the conclusion announced by him.

For the reasons we have stated, and without considering other questions discussed by counsel, the judgment of the Supreme Court of California must be

Affirmed.

See also *Booth*, *In re*, 3 Wis. 1; *Ableman v. Booth*, 21 How. (U. S.) 506; *Copenhaver*, *In re*, 118 Mo. 377; *Tarble's Case*, 13 Wall. (U. S.) 397; *Kelly v. State*, 68 Fed. 652, 655; *West*, *Ex parte*, 100 Ala. 65; *Conway*, *Ex parte*, 48 Fed. 77.

Probably the most uncalled for and extravagant extension of the doctrine of the principal case is found in the decision of the Federal Supreme Court in *Neagle's case*, 135 U. S. 1; that decision amounts to such an evident encroachment on the powers of the state courts as to deserve the condemnation which it has received uniformly. See 2 *Spelling*, Inj. & Ex. Rem. Sec. 1172.

2. State courts.

In practically all the states the common law courts of record have power to issue the writ and except in cases where persons are held in custody by virtue of some federal authority, such jurisdiction of the state court is concurrent with that of the federal courts. It has become a rule of practice almost amounting to a principle that in cases where a person is held in custody by virtue of a state statute which, it is alleged, is in conflict with the *state* constitution, the jurisdiction of the state courts is exclusive. In other words, the federal courts will refuse to issue the writ unless it is alleged that the statute under which the person is held is in violation of the laws, treaties or constitution of the United States.

In most of the states the appellate courts of last resort and the individual justices thereof are authorized to issue the writ. But such courts usually refuse to exercise this power as an original jurisdiction except in extraordinary cases, leaving the petitioner to his remedy before the inferior court.

PEOPLE v. BRADLEY.

1871. SUPREME COURT OF ILLINOIS. 60 Ill. 390.

MR. JUSTICE McALLISTER delivered the opinion of the court:

This is a proceeding upon *habeas corpus* issued out of this court upon the application of Michael C. Hickey, alleging that he was unlawfully imprisoned by the sheriff of Cook county. The sheriff has returned, as the cause of the caption and detention of the

relator, an attachment issued by the criminal court of Cook county against him for a contempt in failing to produce the body of Eli Brown upon a writ of *habeas corpus*.

The illegality of relator's imprisonment, is based upon two grounds:—1st. That the criminal court had no jurisdiction to issue the writ of *habeas corpus*; that it was wholly void, and therefore he could not be in contempt for not obeying it. 2d. That the writ was not delivered to him, so that there was no such service as bound him to obey it.

We think the circumstances preclude him from objecting to the service. The writ was applied for and issued in open court, while he was present with the prisoner, and then read to the relator. The court then took a recess and was to convene in the afternoon for the purpose of proceeding with the case. All this he well knew, and if he had asked for the writ, to make his return, it is presumed that it would have been given to him. But failing to do so, when he was fully cognizant of all the proceedings, will be deemed, under the circumstances disclosed by his petition, and the exhibits, an acceptance of service, and a waiver of the act of delivering the writ to him.

It may be conceded that, if the court had no jurisdiction to issue the writ of *habeas corpus ad subjiciendum* in any case, the writ in question was simply void, and the person to whom it was directed could not be chargeable with contempt in refusing to obey it. The question of jurisdiction is, therefore, the only one we are called upon to decide in this case.

The criminal court of Cook county is but the continuation of the recorder's court of the city of Chicago, with its territorial jurisdiction extended from the boundaries of the city of Chicago, to those of the county of Cook, its criminal jurisdiction enlarged to the inclusion of treason and murder, but its purely civil jurisdiction in all cases between citizen and citizen is taken away. * * *

That the recorder's court had jurisdiction of the writ of *habeas corpus ad subjiciendum*, there can be no doubt. It is a prerogative writ, great and efficacious in the protection of the citizen in one of the most essential of his personal rights—his right to liberty. When independence was achieved, all of the prerogatives of the crown of England devolved upon the people of the states, and are usually, though not always, exercised through statutory and constitutional enactments, and where jurisdiction over any of the writs recognized as prerogative has been given by the common law, or conferred by statute, upon any of the courts of the state, amendments of the constitution continuing such courts will not be deemed to take away the writs, unless the intention so to do at least fairly appears.

It has been repeatedly held in England that the prerogative writ of *certiorari* will not be deemed taken from the crown unless expressly mentioned. *Rex v. Davis*, 5 Term. R. 626; *Rex v. Tindal*, 15 East, 339, n. Nor is the rule limited to cases where the crown has an actual interest, but extends to all prosecutions in the name of the king. *Rex v. Boulton*, 6 N. & M. 26, 4 A. & E. 498, 1 H. & W. 713. This rule is one of the many of that great system, the common law, affording the strongest guaranties of the rights of liberty, and from which system we have borrowed much, and to which have really added but little, by means of either bills of rights, or the development of new principles, except in respect to the abolition of imprisonment for debt.

In *Crowley's case*, 2 Swanston R. 71, Lord Eldon applied the same rule to the writ of *habeas corpus*, in the following forcible language: "It is then contended," he says, "that the statute 31 Car. II, contains an implied negative of the general power of the court of chancery to issue the writ because it expressly confers it in particular cases. Be it so; but if the power existed before that statute, a power vesting a very high prerogative in the king, I say that it could not be taken away in any case, by inference, from an enactment which enforced it in some cases. I go farther; if the prerogative of the king cannot be affected by general words in a statute, will a British court of justice permit it to be said that a statute designed to enforce, in particular instances, the prerogative in favor of the liberty of the subject, shall deprive the subject of that liberty, in any case."

But there is nothing in the limitation of the section of the constitution which amounts to a negative of the general power of the recorder's court to issue the writ. "It (the criminal court) shall have no jurisdiction in civil cases, except in those on behalf of the people, and incident to such criminal or *quasi* criminal matters."

Blackstone, in speaking of the writ of *habeas corpus ad subjiciendum*, says: "This is a high prerogative writ, and therefore by the common law, issuing out of the court of king's bench, not only in term time, but also during the vacation, by a *fiat* from the chief justice, or any other of the judges, and running into all parts of the king's dominions, for the king is at all times entitled to have an account why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted." 3 Bl. Com. 131.

"The *habeas corpus ad subjiciendum*, is that which issues in criminal cases, and is deemed a prerogative writ which the king may issue to any place, as he has a right to be informed of the state and condition of the prisoner, and for what reasons he is confined. It is also in regard to the subject, deemed a writ of right, that is, such an one as he is entitled to *ex debito justitiæ*, and is in the nature of a writ of error to examine the legality of the com-

mitment, and therefore commands the, day, the caption and cause of detention to be returned." 4 Bac. Abr. 564.

The *habeas corpus ad subjiciendum* (so termed from the language of the writ, to undergo and receive all such things as the court shall consider of the party in that behalf), issues in criminal cases, and is deemed a prerogative writ which the king may send to any place, he having a right to be informed of the state and condition of every prisoner, and for what reason he is confined. It is also, in regard to the subject, deemed his writ of right, to which he is entitled *ex debito justitiæ*, and is in the nature of a writ of error to examine the legality of the commitment, and therefore commands the day, the caption and the cause of the detention to be returned." 1 Chit. Crim. Law, 120; 2 Tomlin's Law Dict. 63-64.

The prerogatives of the crown of England being here invested in the people, they, in the place of the crown, are entitled to have an account why the liberty of any citizen is restrained, or, in other words, to be informed of the state and condition of the prisoner, and for what reason he is confined.

Upon this ground the writ always runs in the name of the state or the people. The state, in all cases of wrongful detention, is, in legal presumption, concerned in having justice done, and therefore must be a party to the proceeding to remove it. *Wade v. Judge*, 5 Ala. 130.

The proceeding in *habeas corpus*, says Mr. Justice Betts, "is an inquisition by the government at the suggestion and instance of an individual, but still in the name and capacity of the sovereign." *Barry v. Mercein*, 5 How. 108.

Such being the right of the sovereign in England, of the people of the states here, and the nature of the writ, it is a case which falls within the very exception contained in the clause limiting the jurisdiction of the court in criminal cases. It is substantially a case on behalf of the people, and incident to criminal or quasi-criminal matters.

The writ is unquestionably of common law origin. 2 Inst. 55, 4 Inst. 290, 2 Hale, P. C. 144, 2 Vent. 22; and in *Crowley's case*, 2 Swanst. *supra*, its origin and the jurisdiction of the high courts of England were discussed by a great and accomplished judge. From that case, and the authorities cited, it appears that the courts of Westminster Hall, had a full or partial jurisdiction over the writ, according to the nature of their respective jurisdictions, as respects civil and criminal cases. Hence, the King's Bench, being a court of the highest original jurisdiction in civil and criminal cases, had full and undisputed cognizance of the writ in all cases. The common pleas, being a court of civil jurisdiction only, was supposed, prior to the statute 16 Car. 2, to have but a partial juris-

diction of it. If a party were privileged in that court as being, or supposed to be, an officer or suitor of the court, the writ might, at common law, have been awarded from that court. So with the exchequer. But if he were committed for any criminal matter, those courts could only have remanded him or taken bail for his appearance in the court of king's bench.

In Jones' case, 2 Mod. 198, an application for the writ was made to the common pleas for Jones, who was committed to prison by warrant from a justice of the peace. "The chief justice doubted that a writ of *habeas corpus* could not be granted in this case, because it was in a criminal cause, of which the court of common pleas hath no jurisdiction," and the writ was refused.

In Wood's case, 3 Wils. 172, where the party was in custody under color of civil process, and was a case between subject and subject, the writ was awarded.

If the writ issued out of chancery, and on return thereof the lord chancellor found that the party was illegally restrained of his liberty, he might discharge him; or if he found it doubtful, he might bail; but then it should be to appear in the king's bench, for the chancellor had no power in criminal cases. 2 Toml. Law Dict. 64; Crowley's case, *supra*.

The common pleas having jurisdiction of the writ so far as concerned its civil jurisdiction, in many cases awarded it, and if it appeared, by the return, that the party was illegally imprisoned, it was held that the court should discharge him, although imprisoned for a supposed criminal matter, because the court could not *salvo juramento suo*, remand him to that unjust imprisonment, or, in other words, could not refuse to discharge him. Bushell's case, Vaughan, 155.

This distinction, that the authority of the court over the writ depends upon the nature of the jurisdiction of the court itself in respect to criminal cases, and the nature of the cause of the detention of the person, on whose behalf the application is made, is fully recognized in *Ex parte Tobias Watkins*, 3 Peters (U. S.) 193. Mr. Chief Justice Marshall, says: "This application is made to a court which has no jurisdiction in criminal cases; 3 Cranch 169, which could not revise this judgment; could not reverse or affirm it were the record brought up directly by the writ of error * * ." "The writ of *habeas corpus* is a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause. It is in the nature of a writ of error to examine the legality of the commitment." * * * "We have no power to examine the proceedings on a writ of error, and it would be strange if, under color of a writ to liberate an individual from unlawful imprisonment,

we could substantially reverse a judgment which the law has placed beyond our control."

The circuit courts of this state possess an original common law jurisdiction in criminal causes answering to that of the King's Bench. Consequently, if our *habeas corpus* act had never been passed, jurisdiction of the writ would have devolved upon the circuit courts by common law. All of that jurisdiction is expressly conferred by the constitution of 1870, upon the criminal court of Cook county; so that it possesses all of the authority over the writ given by the common law, and the first section of the *habeas corpus* act, R. S. 269. * * *

In accord.—Baker v. Gordon, 23 Ind. 204; Garner v. Gordon, 41 Ind. 92.

Section 3.—Limitations of the Jurisdiction and Scope of the Remedy.

1. Proper function of the writ.

EX PARTE COUPLAND.

1862. SUPREME COURT OF TEXAS. 26 Tex. 387; *Supra*, p. 689

2. Lack or excess of jurisdiction in court committing prisoner.

MILLER v. SNYDER.

1854. SUPREME COURT OF JUDICATURE OF INDIANA. 6 Ind. 1.

PERKINS, J.—Motion for a *supersedeas*.

Benjamin T. Snyder petitioned Judge Lovering, of the court of common pleas of Clark county, to grant him the writ of *habeas corpus*, to be directed to David W. Miller, warden of our state prison, requiring him to have the body, etc., with the cause of his detention. He alleged in his petition that he was illegally imprisoned, etc. The writ issued. The warden produced Snyder before the judge, and returned, as the cause of his detention, the record of his prosecution in, and conviction and sentence by, the the court of common pleas, of La Pourte county, Indiana, upon a charge of felony in 1854. The judge ordered the prisoner to be discharged from the state prison and returned to the jail of La Pourte county, to await the further action of the courts of said county. The warden appealed to this court.

Did the judge of the Clark common pleas err in making the order of discharge, etc.?

He had authority to issue the writ and hear the cause. 2 R. S. pp. 20 and 22, ss. 23 and 24.

Snyder, though a penitentiary convict, had a right to apply for and obtain the writ. 2 R. S. p. 194, s. 714. And if his detention was "illegal," said section expressly required the judge to deliver him "therefrom."

His detention or imprisonment was illegal, because it was under a void sentence and judgment. That the sentence and judgment were void, necessarily follows from the fact that the court which pronounced them had no jurisdiction of the cause in which they were declared—a point this court has heretofore decided. *Simington v. State*, 5 Ind. R. 479. In *Horner v. Doe*, 1 Ind. R. 130, this court held, *that a judgment, appearing to be rendered by a court having no jurisdiction of the subject matter, was a nullity, and might be so treated, when it came in question collaterally*. See the authorities there cited. Here the want of jurisdiction does appear, as that of the common pleas is conferred by statute, and we must take notice of its extent. In *Williamson v. Berry*, 8 How. (U. S.) 495, the cases on this point are reviewed, and the rule is declared to be, "that where a limited tribunal takes upon itself to exercise a jurisdiction which does not belong to it, its decision amounts to nothing, and does not create a necessity for an appeal."

This question of jurisdiction the judge had a right to inquire into upon the hearing on *habeas corpus*, both upon general principles of law, and under our statute. The statute is (2 R. S. p. 195, s. 725) that the judge, on such hearing, when the prisoner is held "upon any process issued on any final judgment of a court of competent jurisdiction" shall not discharge, etc., plainly implying that the question of jurisdiction is open to inquiry. See, also, 8 How., *supra*.

The judge did right then, in discharging the prisoner from the penitentiary; but the record returned as showing the cause of his detention, showed that a complaint had been preferred against him of an act of felony; that upon that complaint he had been committed to the jail of La Pourte county, in which said felony had been perpetrated, and that he had never been legally discharged from said imprisonment. This was custody to which the common pleas, as an examining court, had a right to commit the defendant and from which the judge, on hearing the *habeas corpus*, had no right to discharge; for the statute enacts (2 R. S. p. 196, s. 725) that where a party is in custody, "upon a warrant issued from the circuit court or court of common pleas, upon an indictment or information," such discharge shall not take place. In this latter case—that of the warrant—the party is held for trial, and not upon final judgment, and hence is legally in custody.

The judge therefore, did right in refusing to discharge the petitioner from his custody, and in remanding him to the jail of La Pourte county.

Our attention has been called to the case of *Wright v. State*, 5 Ind. R. 290, as being decisive of that now before us, but it is not even analogous.

In that case the petitioner for the writ of *habeas corpus* was in the custody of the sheriff upon a warrant issued from the circuit court upon an indictment. In that custody and by virtue of that warrant, it was the duty of the said sheriff to hold his said prisoner till discharged by due course of law. While the prisoner was thus in custody, he was brought before the circuit court, in which certain matters transpired that were claimed by the prisoner to entitle him to his release. Whether they did so entitle him or not, was a question, in the first instance, for that court; and as it had jurisdiction of the cause in which the question arose, its decision upon it, though erroneous, was not void; and having decided that the matters did not entitle the prisoner to his discharge (for the remanding him was such a decision), it was the duty of the officer still to retain him under the warrant upon the indictment.

Take another view of the case. Suppose *Wright* had actually made a formal motion for his discharge, or had pleaded the matters which transpired in bar of further proceedings, and the court had overruled his motion or plea, and proceeded to a further trial; could the ruling have been reviewed upon *habeas corpus*? Surely not; and for the reason that it would have been made by the court having complete jurisdiction of it, and hence, however, erroneous, it would not have been void, and could not have been impeached collaterally, but only reversed on appeal or writ of error.

(Dissenting opinion omitted.)

Per Curiam. The motion for a *supersedeas* is denied with costs. .

EX PARTE JASPER PAGE.

1872. SUPREME COURT OF MISSOURI. 49 Mo. 291.

WAGNER, Judge, delivered the opinion of the court.

It appears from the record submitted to this court that the petitioner was indicted in the Osage Circuit Court for the crime of grand larceny, that he confessed his guilt, and that the court sentenced him to ten years' imprisonment in the penitentiary. He has already served out four years of that time for which he was sentenced, and he now asks to be discharged on the ground that his sentence was illegal.

The statute provides that persons convicted of grand larceny shall be punished as follows:—"First, stealing a horse, mare, geld-

ing, colt, filley, mule or ass, by imprisonment in the penitentiary not exceeding seven years; second, in all other cases of grand larceny, by like imprisonment, not exceeding five years." (Wagn. Stat. 457, sec. 26.) In no case, therefore, does the statute, authorize, for any of the offences which constitute grand larceny, a sentence for more than seven years' imprisonment. Hence the judgment of imprisonment for ten years was in violation of the statute and palpably illegal. It would have been reversible on writ of error or appeal, as a matter of course. Can this court furnish the required remedy in this proceeding? The general principle is that on a hearing of a writ of *habeas corpus*, when it appears that the prisoner is detained by virtue of the final judgment or decree of any competent court of civil or criminal jurisdiction, no inquiry into the regularity of the proceedings, which resulted in the judgment can be had. For all such errors or irregularities the law provides other remedies. (Wagn. Stat. 689, § 33; *Ex parte* Toney, 11 Mo. 661; *In re* Truman, 44 Mo. 181.) But the statute by an express enactment declares that when a prisoner is brought up on *habeas corpus*, if it appear that he is in custody by virtue of process from any court legally constituted, or issued by an officer in the service of judicial proceedings before him, such prisoner can be discharged only in one of the following cases: "First, where the jurisdiction of such court or officer has been exceeded, either as to matter, place, sum or person." * * * Sixth, where the process is not authorized by any judgment, order or decree, nor by any provision of law. (Wagn. Stat. 690, § 35.)

It seems to me that the court in passing sentence exceeded its jurisdiction in the matter, and that it did not act by authority of any provision of law. This application, therefore, I think comes within the meaning of the statute.

It has been suggested that if the prisoner is not discharged, we should reduce the term so as to bring it within the term prescribed by statute. But we know of no authority empowering us to act in proceedings of this kind. The statute makes it the duty of this court to examine the record and award a new trial, reverse or affirm the judgment or decision of the lower court, or give such judgment as that court ought to have given. But that provision in express terms is confined to appeals or writs of error, and can have no application in the present case. We are not aware of any authority by which we can undertake to modify a criminal sentence.

In England the settled practice is that where the inferior court on a valid indictment transcends its power in passing sentence, by giving one which the law does not authorize, the superior or appellate court will neither pass the proper sentence nor send back the record to the court below, in order that they may do so, but

that they will reverse the judgment and discharge the prisoner. (The King v. Ellis, 5 Barn. & Cress. 395; The King v. Bonne, 7 Ad. & Ellis, 58.)

There are numerous American cases where the question has been raised in reference to the courts passing sentences not in conformity with law, but they have all been prosecuted by writ of error or appeal, and I have been unable to find anywhere the point has been raised on a petition for *habeas corpus*.

In *Ex parte* Toney, above referred to, the court laid down the doctrine that on a petition for a *habeas corpus*, it would not investigate the legality of a conviction, or a judgment of a court of competent jurisdiction. The facts in that case were that a runaway slave while going at large and pretending to be free man, committed several larcenies, for which he was indicted, arraigned, convicted, and sentenced to imprisonment as a free person. His master subsequently hearing of him, and ascertaining that he was confined in the penitentiary, made application for his discharge on a writ of *habeas corpus*. The court in denying the writ, said: "There is, then, the judgment of a court of competent jurisdiction, authorizing the confinement of the prisoner, and we cannot in this collateral proceeding question the correctness of that judgment. The judgment of the court is, however, erroneous, and on the facts assumed the party is entitled to some remedy. The error is one of fact. As the record stands it warrants the judgment, and it is an error of fact which produces this difficulty. If the prisoner was a slave and it so appeared on the record, the judgment would be clearly erroneous. It is settled that for an error of fact in the proceedings of a court of record, a writ of error *coram nobis* will be to revoke the judgment, whether it be a court of civil or criminal jurisdiction. (2 Tidd. 1191-2.) If a judgment is rendered against an infant who appeared by attorney, this is an error of fact for which a writ of error *coram nobis* will lie. So if a judgment is rendered against a married woman who is sued as a *feme sole*; and so, it is conceived, of a judgment sentencing an infant under sixteen years of age to imprisonment in the penitentiary, as our statute does not permit such punishment to be inflicted on him."

But in the case just quoted it will be perceived that the error was one of fact, provable by extrinsic evidence *de hors* the record. The record as it stood warranted the judgment, and the error of fact produced the difficulty. In such a case the court would not in a collateral proceeding undertake to revise the judgment. But in the case we are now considering, the question presented is far different. The error here does not arise out of a matter of fact, but is patent on the face of the record. The record proper shows that the judgment of the court in passing sentence was illegal;

that it was not simply erroneous or irregular, but absolutely void, as exceeding the jurisdiction of the court and not being the exercise of an authority prescribed by law.

I think, therefore, that the prisoner is illegally restrained and that he is entitled to be discharged, and with the concurrence of the other judges it will be so ordered.

Lack of jurisdiction, conviction void.—*People v. Rawson*, 61 Barb. (N. Y.) 619; *Wooldridge, In re*, 30 Mo. App. 612; *Hardy, Ex parte*, 68 Ala. 303; *Crandall, In re*, 34 Wis. 177; *Clarke, Ex parte*, 100 U. S. 399; *Clarke's Case*, 12 Cush. (Mass.) 320; *People v. Whitson*, 74 Ill. 20; *Bedard, Ex parte*, 106 Mo. 616; *O'Brien, Ex parte*, 127 Mo. 477.

Excess of jurisdiction.—In California it was held that where a prisoner had been sentenced to three years imprisonment for an offense to which the statute attached a maximum punishment of only six months, he should be discharged on *habeas corpus*, at the end of said six months. *Bulger, Ex parte*, 60 Cal. 438.

See also *Renshaw, Ex parte*, 6 Mo. App. 474; *State, Ex parte*, 87 Ala. 46.

Mere errors or irregularities, however, not affecting the jurisdiction, will not furnish sufficient ground for inquiry on *habeas corpus*; appeal or writ of error in such cases furnishes an adequate remedy.

3. Testing the constitutionality of a law.

IN RE JARVIS.

1903. SUPREME COURT OF KANSAS. 66 Kan. 329; 71 Pac. 576.

MASON, J.—A *prosecution* was brought before a justice of the peace in Ness county, charging the defendant, W. A. Jarvis, with a violation of Chapter 271, Laws 1901 (sec. 3922 to 3929, Gen. Stat. 1901), commonly known as the "Peddler's License Act." The defendant was tried, convicted and sentenced. He asks this court to discharge him upon *habeas corpus* upon the ground that the act referred to is unconstitutional. The states files a motion to quash the writ, and submits the whole matter upon the motion: urging that, if even if the unconstitutionality of the statute were conceded, the petitioner could not be discharged in this proceeding, under the rule lately announced in *In re Gray*, 64 Kan. 850, 68 Pac. 658. The doctrine of the Gray case, however, does not extend to the case at bar. In that case the petitioner was arrested and held for trial under an ordinance which he claimed to be unconstitutional. This court refused to examine into and determine the question so sought to be raised in advance of the decision of the court before which the matter was pending. There the very question which this court was asked to decide was in a fair way to be speedily determined in the lower court, and the petitioner, if

aggrieved by the decision, had his remedy in the course of ordinary judicial proceedings, by appeal. And the court held that, under our statute, as the prisoner was held under process issued upon what was in effect, an information, the statute did not authorize an inquiry into the validity of the custody upon *habeas corpus*. But in the present case the petitioner has been convicted and sentenced and is held upon a commitment issued, not upon an indictment, information, or complaint, but upon a final judgment. It has been held in many well considered cases, that even after conviction the defendant will not be permitted to have the constitutionality of the act under which he is prosecuted investigated upon *habeas corpus*. The argument is that the judgment of the trial court upholding the validity of a statute unconstitutional is not a nullity, but binds the parties unless vacated upon direct attack upon proceedings in error. *The greater weight of authority, however, favors the view that an unconstitutional law is a nullity—is no law at all—and that a conviction under it is not merely erroneous, but void, and subject to collateral attack upon habeas corpus.* This view doubtless results more from a jealous regard for the personal liberty of the citizen taken than from the force of the reasoning employed as applied to the other subjects of litigation. The authorities upon both sides of the question are collated and discussed in a note to the case of Koepke v. Hill (Ind.) 87 Am. St. Rep. 161, at pages 174 to 176 (s. c. 60 N. E. 1039), and in a note to Hovey v. Elliott, (N. Y.) 39 L. R. A. 449 at pages 450 to 454 (s. c. 39 N. E. 841.) But this case presents a special feature of the general question. The petitioner was convicted in justice court, and the time within which he might have appealed to the district court has gone by. Gen. Stats. 1901, § 5826. He either has a remedy by *habeas corpus* or he has no remedy at all. It may be urged that, having lost the remedy by appeal by permitting the time to elapse, he is not in a position to avail himself of this consideration. In response to this it may be said, however, that the statute provides no appeal, except upon the giving within twenty-four hours of a recognizance, with sureties, for appearance at the district court. In some cases this might be prohibitive. Without at this time passing upon the question in any other aspect, we decide that where a defendant has been convicted of a misdemeanor, in justice court, and no appeal has been had, and the time for an appeal has expired, he may challenge the constitutionality of the statute, under which he was convicted, in an application to this court for a writ of *habeas corpus*.

The petitioner claims that the statute in question is unconstitutional upon several grounds, only one of which it will be necessary to consider. The statute provides that it shall be a misdemeanor for anyone to deal as a peddler without paying for and

procuring a license from the county clerk, but expressly exempts from its operation the owner of goods, peddling them in the county in which he is a resident taxpayer, or in any county immediately adjoining thereto. The statute therefore attempts to impose a tax upon non-residents of the state, from which certain residents of the state are exempted by reason of such residence. This is an obvious discrimination in favor of the resident, and against the non-resident, and is repugnant to section 2 of article 4 of the federal constitution, which provides that the citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states. *Ward v. Maryland*, 12 Wall. 418, 20 L. Ed. 449; *Feicheimer Bros. v. City of Louisville*, 84 Ky. 306, 2 S. W. 65; *Graffy v. City of Rushville*, 107 Ind. 502, 8 N. E. 609, 57 Am. Rep. 128. The petitioner avers that he is a citizen and resident of the state of Georgia, and is therefore in a position to complain of the discrimination.

The motion to quash will be overruled, and the petitioner discharged. All the justices concurring.

EX PARTE JOSEPH NEET.

1900. SUPREME COURT OF MISSOURI. 157 Mo. 527; 57 S. W. 1025.

MARSHALL, J.—This is a proceeding by *habeas corpus*, instituted by the petitioner, for the purpose of obtaining his discharge from the custody of the sheriff of Lafayette county, and from his imprisonment in the county jail, where he is held under a warrant of commitment issued by the criminal court of that county upon a conviction before that court “on a charge of playing baseball on Sunday”—the information simply charging that the petitioner and others therein named “on the fourth day of June, 1899, at the county of Lafayette, and state of Missouri, did then and there unlawfully play a game of ball, commonly called baseball, on the first day of the week, commonly called Sunday, against the peace and dignity of the state, etc.” Among the other persons charged in the information with having played the game of baseball with the petitioner, was one R. Vaughn, who was also convicted. He appealed to the Kansas City Court of Appeals, and that court dismissed the appeal, on the ground that an appeal would not lie from a conviction upon an information. (*State v. Vaughn*, 3 Mo. App. 268.)

Two questions are presented in this case, first, is it unlawful in Missouri to play a game of baseball on Sunday; and, second, is *habeas corpus* an available remedy to one convicted and imprisoned for so doing? * * *

(The court concluded, with respect to the first question, "that there is no law in this state which prevents playing a game of baseball on Sunday, and therefore this defendant, is imprisoned for an act which is not unlawful, and therefore the imprisonment is wrongful.")

The only remaining question is, whether *habeas corpus* is the proper remedy.

The rule must now be regarded as settled in this state that if a person is imprisoned for an act which is not in contravention of any existing law, or if the act under which he is held is unconstitutional, habeas corpus is the proper remedy to restore to him his freedom, of which he has been improperly and illegally deprived. (Ex parte Slater, 72 Mo. 102; Ex parte Arnold, 128 Mo. 256; Ex parte O'Brien, 127 Mo. 477; Ex parte Craig, 130 Mo. 590; Ex parte Smith, 135 Mo. 223.)

The underlying reason is that an unconstitutional act is no law at all, and that no court has the right to imprison a citizen who has violated no law of the state, but that such act, even if done by a court under the guise and form of law, is as subversive of the right of the citizen as if it was done by a person not clothed with authority, and hence it is the duty of this court, under section 3 of article 6 of the constitution, to discharge him by means of the writ of *habeas corpus*. This, too, irrespective of any other relief which may be available to him. For it is the very purpose of this writ to restore freedom to those who have been deprived of it without warrant or authority of law. Of course it will be understood that *habeas corpus* will not be allowed to perform the functions of a writ of error or appeal, but will only lie where the imprisonment is absolutely without authority of law or for an offense which has not been made an offense against the law, or where the act under which he is imprisoned is unconstitutional, and therefore it is no law at all. This is the plain meaning of sections 5375 and 5378, Revised Statutes 1889.

For these reasons the petitioner is discharged from custody as prayed. All concur as to first paragraph, and GANT, C. J., SHERWOOD and BURGESS, JJ., concur, also, as to second paragraph; ROBINSON, BRACE, and VALLIANT, JJ., dissent as to second paragraph.

In accord.—Siebold, *Ex parte*, 100 U. S. 371; Henderson v. Heyward, 109 Ga. 373; Rollins, *Ex parte*, 80 Va. 314; O'Leary, *Ex parte*, 65 Miss. 80; Gribben, *In re*, 5 Okla. 379; Fisher v. McGirr, 1 Gray (Mass.) 1; Smith, *Ex parte*, 135 Mo. 223; Lucas, *Ex parte*, 160 Mo. 218; Moore v. Wheeler, 109 Ga. 62; State v. Redmon, 43 Minn. 250; Jacobs, *In re*, 98 N. Y. 98; Garza, *Ex parte*, 28 Tex. App. 381; Hodges, *Ex parte*, 87 Cal. 162; Frazee, *In re*, 63 Mich. 396; State v. Ray, 63 N. H. 406; Burnett, *Ex parte*, 30 Ala. 461; Jackson v. Boyd, 53 Iowa, 536; Hauck, *In re*, 70 Mich. 396; Doyle, Petitioner, 16 R. I. 537.

The weight of authority is undoubtedly in favor of the proposition that courts may examine the constitutionality of a statute or ordinance on

habeas corpus brought after conviction thereunder and, if the same is found unconstitutional, discharge the prisoner. In Missouri, for a long time, no definite principle seems to have been established. In Boenninghausen, *Ex parte*, 91 Mo. 301, 21 Mo. App. 267; Mitchell, *Ex parte*, 104 Mo. 121; Olden, *Ex parte*, 37 Mo. App. 116; Harris, *Ex parte*, 47 Mo. 164; Bowler, *Ex parte*, 16 Mo. App. 14, it was held that the court could not undertake an inquiry in the constitutionality of an ordinance or statute on *habeas corpus*; in the following cases, however, such inquiry was made: Wooldridge, *In re*, 30 Mo. App. 612; Swann, *Ex parte*, 96 Mo. 44; McDonald, *In re*, 19 Mo. App. 370; Marmaduke, *Ex parte*, 91 Mo. 228; Thompson, *In re*, 117 Mo. 83; and in Smith, *Ex parte*, 135 Mo. 223, the court speaking through Sherwood, J., declared: "That it may now be regarded as the established doctrine of this court that it will interfere by means of the writ of *habeas corpus* to look into and investigate the constitutionality of a statute or ordinance on which a judgment which results in the imprisonment is founded."

The contrary principle is adopted in the following cases on the ground that to allow the petitioner to come directly before the appellate tribunal on *habeas corpus* and therein to question the constitutionality of the act or ordinance by virtue of which he is confined, is to permit this extraordinary writ to perform the ordinary functions of a writ of error or appeal. *People v. Jonas*, 173 Ill. 316; *Koepke v. Hill*, 157 Ind. 172; *Platt v. Harrison*, 6 Iowa, 79; *Pikulik, In re*, 81 Wis. 158; *People v. Mallary*, 195 Ill. 582; *Underwood, In re*, 30 Mich. 502; *Maguire, In re*, 114 Mich. 80; *Fisher, Ex parte*, 6 Neb. 309.

4. Custody of children.

HENRY D. RUST v. MARY E. VANVACTER.

1866. SUPREME COURT OF APPEALS OF W. VIRGINIA. 9 W. Va. 600.

(PETITIONER sued out the writ of *habeas corpus* to obtain the custody of his infant child which had been placed in the care of respondent, the grandmother of said infant, upon the decease of petitioner's wife. Since then petitioner had remarried, owned a house and was engaged as a mechanic at good wages, sufficient to enable him to support said infant. Respondent alleged that the custody of said infant had been committed to her by its mother on the latter's deathbed, at which time said infant was about five months old. That she is now nearly nine years old and has during all that time been tenderly cared for and nurtured by said respondent whom she looks upon as her mother.

Upon the trial of the cause, respondent excepted to certain rulings of the court and to the final order delivering the said child to the custody of the petitioner. To said order respondent obtained a *supersedeas* from the court of appeals, upon petition and assignment of error.)

HAYMOND, President:— * * * This case presents circumstances and facts of great interest as well as delicacy, "involving

legal rights and the dearest feelings of the parties." On the one hand, is the legal right of the only parent and his parental interest and feelings, and on the other hand the feelings and rights, such as these rights may be, of the grandmother. And again the feelings, and, it may be, future prosperity and condition in life, of the infant child. In any event, the decision of the case, must cause pain and perhaps disappointment. This court, however, must perform its duty, and administer and pronounce the law of the case according to the facts. This duty, the court will perform according to its understanding.

The first error assigned is, substantially, that the *habeas corpus* act in force in this state, is not intended to confer jurisdiction upon a judge in vacation, to relieve from private restraint, but is only applicable to cases of public restraint.

Chapter one hundred and eleven of the code of this state, has been amended and re-enacted. See chapter 50, page one hundred and forty-nine of the acts of 1872 and 1873. The first section of the chapter one hundred and eleven, as amended and re-enacted, declares that "The writ of *habeas corpus ad subjiciendum* shall be granted forthwith by the supreme court of appeals, or any circuit court, or any judge of either court in vacation, or any county court of any county in the state, to any person who shall apply for the same by petition, showing by affidavit or other evidence, probable cause to believe that he is detained without lawful authority." This section as re-enacted, is the same as contained in the code in chapter one hundred and eleven, except the authority given to the county court. The writ of *habeas corpus* under our statute, is not limited to cases of detainer for criminal or supposed criminal matters, but applies to all illegal confinement, and, under it, the petition for the writ of *habeas corpus* to obtain the possession of an infant child may be in the name of the father claiming the possession of the child. *Armstrong v. Stone and wife*, 9 Gratt. R. 102, 399; *Commonwealth v. Hamilton*, 6 Mass. 273; *The People v. Mercein*, 3 Hill (N. Y.) This is not a contest for the guardianship of the child, and if it were, it seems it could not be determined in this form of proceeding. *Id.* 105 and 106; *Hurd on Habeas Corpus*, 457. "The term *imprisonment* usually imports a restraint contrary to the wishes of the prisoner; and the writ of *habeas corpus* was designed as a remedy for him, to be invoked at his instance to set him at liberty, not to change his keeper. But in the case of infants, the illegal custody has been treated, at least, for the purpose of allowing the writ to issue as equivalent to imprisonment; and the duty of returning to such custody, as equivalent to a wish to be free." *Hurd on Hab.* 454. In the case in 9 Grattan, before cited, Judge Allen, in delivering the opinion of the court, at page 106, says:—"Whilst it is undoubtedly true,

that the proper office of the writ is to release from illegal restraint, and where the party is of years of discretion and *sui juris*, nothing more is done than to discharge him; yet, if he be not of age to determine for himself, the court or judge must decide for him, and make an order for his being placed in the proper custody. And to enable it to do so, must determine to whom the right to the custody belongs. The custody of the minor will be assigned to the person having the right, unless it appeared he was an improper person to take it. The first error assigned is not well taken and is overruled.

The second error assigned, is that the petition is bad on demurrer. The child in this case being so young, only between eight and nine years of age, I do not think it was necessary to allege in the petition, in express terms, that she was detained against her will. The petition shows on its face, a legal right to the custody of child, and the detention of the child from the father in violation of that right. The facts stated, in the petition it seems to me, are sufficient to justify the issuing of the writ. It seems to me that it is not regular or proper to demur to the petition; but that the proper course to pursue, ordinarily, is to produce the child or prisoner; make return, and then move to quash the writ, if it were issued without sufficient cause. But the language employed in our statute is, "who shall apply for the same by petition, showing, by affidavit or other evidence, probable cause to believe that he is detained without lawful authority." The petition, then is not always to be looked to exclusively, to ascertain if the child or prisoner is detained without lawful authority. The words of the statute providing so great and efficacious remedy for an illegal confinement, should be construed literally. The second assignment of error is not well taken and is overruled.

The third assignment of error is, that this proceeding is not intended or adapted to the determination of any question involving the existence or continuation of a contract, or the establishment of any collateral right, such as is involved in this case. In *Ruddle's excr. v. Ben*, 10 Leigh 467, Judge Parker in delivering the opinion of the court at page 476, says:—"It often happens that a judge is forced to decide the most embarrassing and delicate questions on the return of that writ. The writ itself applies to all cases of the illegal detention of the person, except that which grows out of the relation of master and slave: and it would apply to that also, but another remedy is provided which seems entirely to preclude a resort to the *habeas corpus*." "The power of a judge, or other officer, in vacation, in respect to the custody of infants, when the jurisdiction under the writ is conferred in general terms, and without particular qualifications, is the same as that of a court of general jurisdiction in term, when acting under the writ alone.

The powers of a judge or court of law, are the same as that of a court of equity under the writ. It has, sometimes, been supposed that a chancellor or a court of equity, possessed ampler powers, under the writ of *habeas corpus*, than a judge or court of law, could exercise. But this is a mistake. The jurisdiction in such cases, and the powers under the writ are "exactly the same." *Crawley's case*, 2 Swanst. 79; *Lyons v. Blenheim*, Jac. 245, n.; *Matter of Wollenscraft*, 4 Johns. C. R. 80; *Hurd*, 456, 457." The grounds upon which courts of equity proceed in questions of parental custody are more numerous, and sometimes of a different character from those upon which orders in *habeas corpus* are founded. *Hurd*, 457. "The jurisdiction of the court or judge, to determine who has the right to the custody of the minor upon a *habeas corpus*, has been uniformly affirmed." *King v. Delavel*, 3 Burn. R. 1434; *King v. Greenhill*, 3 Eng. C. L. R. 153; 9 Grat. 106, 107.

I don't think there is any contract, or fact, disclosed in this case to prevent the judge from deciding and disposing of the custody of the child. *People v. Mercein*, 3 Hill. 309; *State (Herrick relator) v. Richardson*, 40 N. H. 272; *State Ex rel. John Mayne v. Henry Baldwin*, 5 N. J. Eq. R. 454, 455. The third error is not well taken and is overruled.

The fourth error assigned is, that the judge erred on the merits, and also in not requiring the bond asked for.

The fifth error assigned is, that the child on the day of the order remanding her to the custody of the father, lacked but four months and ten days of being nine years of age, and the judge should have relieved the child of restraint, if any existed, and should not have ordered her into the custody of her father against her will.

The sixth, that the welfare of the child should have been the paramount consideration, and, in this case, she should not have been subjected to depressing influences.

The seventh error assigned is, that "The petition of Rust was not simply to enforce his legal right of custody, but for equitable relief. The judge should, therefore, have remitted him to a court, which could administer equity. These four last assignments of error I will consider together.

I think there is doubt whether the third section of act of 1873, as to the bond, was intended to apply to a case like this, but that, if it does, it is a matter intended to be left in the discretion of the court, or judge, as to whether the bond should be required or not, and may not be demanded by the person to whom the writ is directed, as a legal right. At all events, the refusing to require the bond asked, is not sufficient to authorize this court to reverse the order, and judgment of the judge in this case. The father is the natural guardian of his infant children, and in the absence of good and sufficient reasons shown to the court or judge, such as ill usage,

grossly immoral principles or habits, want of ability, etc., is entitled to their custody, care and education. It seems that all the authorities concur on this point. 9 Grat. 106, 107, 108; 3 Hill. (N. Y.) 399; 40 N. H. 272; 1 Strange, 579; 2 Ld. Raym. 1334; 3 Burr. 1436; 5 East 221; 9 J. B. Moore, 278; 10 Ves. 51; 12 *id.* 492; 2 Russell, 1 Jacob 245; and notes to the case; 4 Cond. Ch. 115; 2 Simon, 35; 2 Cond. Ch. 299; 8 Johns. 328; 2 Kent's Com. 220 and 194; 1 Dow. N. S. 152; 2 Fenbl. 232 (N); 2 Bro. C. C. 101; Blesset's case, Lefft. 74; 8 *Ex parte* McClellan, 1 Dow. P. C. 81; 2 Cox, 242; Commonwealth v. Briggs, 16 Pick. 205; The People *ex rel.* J. Nickerson, v. —, 19 Wend. 14.

The custody of the minor will be assigned to the person having the right, unless it appears he is an improper person to take it. And when such person has not the custody, and is seeking to be restored to it, the court will exercise its discretion according to the facts, consulting the wishes of the minor, if of years of discretion; if not, exercising its own judgment as to what will be best calculated to promote the interests of the child, having due regard to the legal rights of the party claiming the custody. 9 Grat. 106, 107; 4 Ad. & El. 624. The child in this case, is not nine years old, or rather was not, when the judge made the order in question. In the case *In re* Preston, 5 Dewl. & L. 247, Patterson, J., said:—"In deciding this question it seems to me, it is altogether useless to question the child, as to with whom he might wish to be. It is difficult to say at what age a child is capable of exercising a sound discretion and judging for itself in matters of this kind; but it seems to me that it is but mockery to ask a child of nine years of age whether he would sooner remain with a person who has brought him up, or go with a stranger."

In *Rex v. Johnson*, 1 Str. 579, the infant was nine years old, the court said:—"This being the case of a young child, who had no judgment of her own, they ought to deliver her to her guardian." In the case of *State* (Herrick, relator), v. Richardson, 40 N. H. 272, it was held that the action of the court should not be held by the wishes of a child ten years of age. In this state, infants are not permitted to choose their guardians until they are fourteen years years of age. The law in this respect must be founded upon the presumption that infants, prior to that age, are incompetent to make a proper or judicial selection. It does not appear that the child in this case, had ever been sent to school, or received any education, and it seems to me that considering her tender years, and all the circumstances, she is too young to decide for herself into whose custody she should go, or be placed, and that it is the duty of the court to determine to whom the custody belongs. The seventh section of chapter 149, of the acts of the legislature of 1872 and 1873, provides that "Every guardian who shall be appointed as

aforesaid, and give bond when it is required, shall have the custody of his ward, and the possession, care and management of his estate, real and personal, and out of the proceeds of such estate, shall provide for his maintenance and education; but the father of the minor, if living, and in case of his death, the mother, if fit for the trust, shall be entitled to the custody of the person of the minor, and to the care of his education." Whatever may be the rule at common law, with us, the return of the person to whom the writ is directed, is not conclusive, for the language of the law is "That the court or judge after hearing the matter, both upon the return and any other evidence, shall," etc., 6 section of Ch. 60, p. 150, acts of 1872 and 1873. The return, therefore, may be contradicted, in whole or in part, by other evidence in this proceeding.

In the case of the State *ex rel.* John Mayne, v. Henry Baldwin, 5 N. J. Eq. R., by Halstead, page 454, it was decided that an infant daughter should be delivered, to her father, though he had verbally committed her to the care and custody of the respondent until she should attain the age of twenty-one years, and the respondent had adopted her accordingly. See also, 40 N. H. 279, and cases there cited, touching the same subject, and also *In re* Boreman, 16 Eng. Law & Eq. 221, also Johnson v. Terry, 34 Conn. 259. There seem to be other cases holding otherwise. Hurd, 528, 537, 539, 540. I do not, however, now definitely determine that question, as I deem it unnecessary in this case. I do not think that the evidence in this case shows that the petitioner has waived, or abandoned, or intended to waive or abandon, his parental rights, by permitting his child to remain with its grandmother, so long, or that he ever transferred, or intended to pass his parental rights to his child to respondent, so as to deprive him of his legal right to retain it. The evidence is, to some extent, contradictory, and as witnesses were personally before the judge, more consideration must be given to his judgment so far as the credibility of witnesses who testified before him, are concerned, than if the case had been decided altogether upon the return and affidavits, or depositions, for obvious reasons. I do not think the objection to the conclusion of the petition is tenable. In so far as it is inapplicable to the petition for the writ, it might properly be regarded as surplusage. I am unable to see what relief a court of equity could give upon the facts stated in the petition and the prayer. See upon this subject, Hurd, 458, 459, 460, 461. I see no objection to the judge ordering such relief upon the petition as is authorized by the law in such case; and, of course, any relief prayed for, which the court or judge is not authorized to grant, would be disregarded. But some courts and judges have determined such cases upon equitable principles, to some extent, and granted relief by changing the custody of the

child with terms deemed equitable and just. In the case of the Commonwealth v. Biggs, 16 Pick. 203, Chief Justice Shaw says at page 205, "And the court will feel bound to restore the custody where the law has placed it, with the father, unless in a clear and strong case of unfitness on his part to have such custody." Finally, I do not feel authorized under the circumstances, to decide that the judge has abused the writ in this case.

Upon the principles of the case in 9 Grattan and 40 New Hampshire, which have been cited and referred to, and other cases similar in important respects, looking to the interest of the child, the legal rights of the parent, and the circumstances of the case in other respects, I do not feel that this court is authorized to reverse the final order and judgment of the judge made in this case, but the same is affirmed with costs and \$30 damages to Henry D. Rust, the defendant in error, against Mary E. Vanvacter, the plaintiff in error.

The other judges concurred.

Judgment affirmed.

QUEEN v. MARIA CLARKE. IN RE ALICIA RACE.

1857. COURT OF QUEEN'S BENCH. 7 Ellis & Blackburn 185.

A WRIT of *habeas corpus ad subjiciendum*, returnable at chambers, to bring up the body of Alicia Race, an infant, issued by order of Coleridge, J., on second of January, 1857, at the instance of Alicia Race, the mother of the infant. It was addressed to Maria Clarke. The return was, that the child was placed under the care of Miss Clarke by the commissioners of the Royal Patriotic Fund; and that she did not detain, and never had detained, the child against its will. Crompton, J., at chambers, referred the matter to the full court. * * *

(The infant in question was between the age of ten and eleven. Petitioner, the mother, sought to obtain custody of said child, in order to educate it in the Roman Catholic faith, to which the mother belonged. Further facts appear in the opinion.)

LORD CAMPBELL, C. J., now delivered judgment.

In this case we are to determine what directions ought to be given by the court respecting Alicia Race, an infant of the age of ten years and a few months, brought up under a writ of *habeas corpus*, granted at the instance of her mother. On the one side it is contended that we ought at once to order the child to be delivered to her mother; and, on the other that we should ask the child to make her election, whether to go home with her mother or to return to school from which her mother wishes to remove her.

It is not disputed that, the father being dead without appointing a guardian, the mother is now guardian for nurture; and it is laid down, Ratchiff's case, 3 Rep. 37, a, 38 b, that guardianship for nurture, continues until the child attains the age of fourteen. And observations were made that the commissioners of the school are in *loco parentis*; but this was little relied upon and is wholly untenable. As a general rule it is admitted that, if a child under the age of seven years is so brought up, the court ought at once order the child to be delivered to the guardian. But the contention is that, between the ages of seven and fourteen, that the court ought to examine the child and see whether it has sufficient mental capacity to be competent to make a choice, and, according to the degree of mental capacity which it is found to possess, to hand it over to the guardian, or to liberate it and to desire it to go where it pleases. With regard to the maintenance of the poor, a rule has been introduced, that while a child is under seven it shall not be separated from the mother for the purpose of being maintained by the parish in which it is settled. Again, by Sergeant Talfourd's Act (2 & 3 Vict. c. 54, s. 1), it is enacted that, where infants under the age of seven years are in the sole custody or control of the father, the lord chancellor or the master of the rolls may make an order that such infants may be delivered to and remain in the custody of the mother until they attain the age of seven years. Under seven is sometimes called the age of nurture; but this is the peculiar nurture required by a child from its mother, and is entirely different from guardianship for nurture, which belongs to the father in his lifetime, even from the birth of the child. We can find no distinctions in the books as to the rights and incidents of this species of guardianship from the time when it commences until the time when it expires. One of these incidents is that the guardian shall be entitled to the custody of the person of the child. Without such right he could not possibly perform the duties cast upon him as guardian. He is to nurture the child; the legal sense of this word is its natural and common sense in the English language, which Dr. Johnson says, "is to educate, to train; to bring up." Accordingly, from the case to be found in the Year Book (Mich. 8 Ed. 4, fol. 7 B. ph. 2.) to the present time, it has ever been considered that the father, or whoever else on his death may be the guardian for nurture, has by law a right to the custody of the child, and shall maintain an action of trespass against a stranger who takes the child. See the authorities, Com. Dig. Guardian (D.)

The question then arises, whether a *habeas corpus* be the proper remedy for the guardian to recover the custody of the child, of which he has been improperly deprived. Certainly the great use of this writ, the boast of English jurisprudence, is to set at liberty any of the Queen's subjects unlawfully imprisoned; and,

when an adult is brought up under a *habeas corpus*, and found to be unlawfully imprisoned, he is to have his unfettered choice to go where he pleases. But, with respect to a child under guardianship for nurture, the child is supposed to be unlawfully imprisoned when unlawfully detained from the custody of the guardian; and when delivered to him the child is supposed to be set at liberty. *Rex v. De Mandeville*, 5 East 221, clearly proves that such is the fit mode of proceeding if the child is under seven. Is there any reason for following a different course between seven and fourteen? The intellectual faculties of the child may be considerably developed during this period; and the child may now have a very strong inclination to leave the home of the guardian, and from religious, as well as frivolous motives, to be educated at a different school from that which the guardian has selected. But the consequences which would follow from allowing such a choice are most alarming. We must lay down a rule which will be generally beneficial, although it may operate harshly in particular instances. If the proposed choice were given to the child, the relation of guardian and ward would still subsist; the guardian might retake the child wherever he finds it; and he might maintain an action against the person who, contrary to his wishes, takes or detains the child. Then, how could nurture be carried on with such a doctrine, which, if established, would apply to every father of a family, in the kingdom, in respect of all his children, male and female, above the age of seven years? If a father wishes to take his son when ten years of age from a private school where flogging is not practiced, and send him to Eton, and the boy refuses to come home, and is brought up by *habeas corpus*, is he to be permitted to say that, on consideration, he is of the opinion that the private school is preferable to any public school where flogging is permitted, and therefore, he makes his choice to return to the private school, the master being willing to receive him? Or suppose that a Protestant mother, guardian for nurture of a child of seven years of age, sends her to a boarding school professing to be a Protestant school; in a short time she finds that attempts have been successfully made by teachers there to convert the girl to the Roman Catholic faith; the girl refuses to come home, saying in analogy to the language used by Alicia Race, "I will not go home to my own mother; I will stay here where I may pray to the mother of God;" she is in consequence brought up by *habeas corpus*. Are we to examine her, and, finding her of quick parts and professing to be a sincere convert to the Roman Catholic faith to tell her that, in spite of the wishes of her mother, she is at liberty to return to the school where she has been converted? Such a doctrine seems wholly inconsistent with parental authority, which both reason and revelation teach us to respect as essential for the welfare of the

human race. Indeed, allusions were made during the arguments at the bar to the workings of *prevenient grace*, and to the words of our Lord, "Suffer little children, and forbid them not, to come unto me; for of such is the kingdom of heaven." It must be enough merely to say that the parental authority is in no degree weakened by such sacred doctrines or precepts; for it is impossible, without irreverence, to show more fully how irrelevant they are. This suggests the extreme inconvenience which would arise from the proposed examination of the child. If there is to be an examination, it ought to be conducted before all the judges who are to take part in the adjudication; and after testing her mental acumen, we ought to ascertain whether it is upon due investigation that she has imbibed a preference for Protestantism and such an aversion to the Roman Catholic faith.

When we look into our law books, although we do not find the exact age defined within which the court, on a *habeas corpus*, will order the child to be delivered up to the parent or guardian without examination, we do find cases where this course has been adopted, the child being above seven years of age; and we find nothing to indicate that the rights of the guardian for nurture are in any respect impaired during the period of guardianship. In *Rex v. Johnson*, 1 Str. 579, 2 Ld. Raym. 1333, a female child, nine years old, was brought up by *habeas corpus*, in the custody of her nurse, having a testamentary guardian appointed by the father. The court at first doubted whether they should go any farther than to see that the child was not under any illegal restraint; but afterwards declared that, this being the case of a young child who had no judgment of her own, they ought to deliver her to her guardian, although she was very unwilling to be taken from Mrs. Johnson, her nurse, who was her near relation and who had cared for her tenderly and disinterestedly. It was afterwards said in *Rex v. Smith*, 2 Str. 982, that Lord Raymond, who had been a party to this judgment, repented of what he had done. But in his own report of the case, he throws no discredit upon it; and Lord Mansfield afterwards expressed strong approbation of the case, and said, that if Lord Raymond had changed his mind, his first judgment was clearly the right one; *Rex v. Delavel*, 1 Sir W. Bl. 410, 413. It is unnecessary to travel through the cases *seriatim*, as they are all reviewed in *Rex v. Greenhill*, 4 A. & E. 624, (E. C. L. R. vol. 31) where the court laid down the rule that, *where a young person under the age of twenty-one years is brought before the court by habeas corpus, if he be of an age to exercise a choice, the court leaves the infant to elect where he will go, but, if he be not of that age, the court must make an order for his being placed in the proper custody.* Lord Denman, Littledale, J., Williams, J., and Coleridge, J., all make age the criterion, and not mental

capacity, to be determined by examination. They certainly do not expressly specify the age; but they cannot refer to seven as the criterion; and there is no intervening age marking the rights or responsibility of an infant till fourteen, when guardianship for nurture ceases, upon the supposition that the infant has now reached the age of discretion.

When we attend to the authorities cited by the counsel for the commissioners, we find some vague *dicta*, and even some decisions, which, at first sight, give a color to the doctrine of examination and choice under fourteen, but which admit of an explanation entirely consistent with the claim of the guardian. In *Rex v. Smith*, 2 Str. 982, *Rex v. Johnson*, 1 Str. 579, 2 Ld. Raym. 1333, is said to have been overruled, because a boy who had not completed his fourteenth year, being brought up by *habeas corpus* at the suit of the father, from the custody of an aunt with whom he wished to live, was set at liberty instead of being delivered up to his father, and was allowed to return to his aunt; but Lord Mansfield in commenting upon the case, gives the true *ratio decidendi*, upon which, and upon which alone, it can be supported. That case was determined right; "for the court were certainly right in refusing to deliver the infant to the father; of whose design in applying for the custody of his child, they had a bad opinion;" *Rex v. Delavel*, 3 Burr. 1434, 1436. There is an admitted qualification on the right of the father or guardian, if he be grossly immoral, or if he wishes to have the child for any unlawful purpose.

The counsel for the commissioners relied much upon the case of *In re Loyd*, 3 M. & G. 547 (E. C. L. R. vol. 42) where the mother of an illegitimate child between the age of eleven and twelve years having obtained a *habeas corpus* directed to the putative father to bring it up, the court refused to order it to be delivered to the mother, and declared that it might use its own discretion; and, the child, being unwilling to go with the mother, the court would not allow the mother to take it by force. But Maule, J., there asked, "How does the mother of an illegitimate child differ from a stranger?" And, although the relation of the mother to her illegitimate child is recognized for some purposes, it is clear that she has not over it all the rights of guardian for nurture. From what was said by Lord Ellenborough in *Rex v. Hopkins*, 7 East 579, it would appear that it is only while an illegitimate child is under the age of seven years (an age during which the law of nature and the law of the land both say that the child, whether legitimate or illegitimate, ought not to be separated from the mother), that the courts will interfere to protect the custody of the mother. In *In re Loyd*, 3 M. & G. 547, the child was considerably above that age. The only other decision much relied upon as to the right of the parent or guardian on a *habeas corpus* was in

In re Preston, 5 D. & L. 233, where a most distinguished judge refused to issue a writ of *habeas corpus* to bring up a legitimate child, above the age of seven, on the alleged application of the mother who had become guardian for nurture, the father being dead. But the application was made under a power of attorney, the mother remaining in the East Indies, so that the child could not have been delivered to her. The real opinion of my brother Patterson, upon this subject, we have fortunately an opportunity of knowing from a note of Sir Erskine Perry, late Chief Justice of Bombay, in a very interesting collection of "Oriental Cases," decided and published by him. A Parsee family having detained an infant from its father, a Parsee, on the ground that the father had embraced the Christian religion, on a *habeas corpus* the court had ordered the child to be given up to the father. In another case, the court, on *habeas corpus*, had ordered a Hindu boy, of twelve years of age, who professed to have embraced Christianity, to be delivered up to his father, who adhered to the Hindu religion; and the judges refused to examine the boy as to his capacity and knowledge of the Christian religion. In similar cases the Supreme Court at Calcutta had followed a different course. There being no appeal in such matters to a higher court, Sir Erskine Perry, for his subsequent guidance, very properly submitted the question to my brother Patterson, whose response was as follows:—"I cannot doubt that you were quite right in holding that the father was entitled to the custody of the child, and enforcing it by writ of *habeas corpus*. The general law is clearly so, and even after the age of fourteen; whereas this boy (Shripat) was only twelve. The right may indeed be forfeited by misconduct of a very gross nature, but nothing of that kind appears to have been brought forward. It may have been an act of imprudence originally in the father, to place his boys with persons who were likely to bring them up in religious faith and opinion contrary to the father; I suppose he made some stipulations for avoiding this; but whether he did or not, I do not think that the law would be affected thereby. Even if he had changed his mind on that subject, as well as on the education of his boys in other respects, I know of no law which forbids him to do so, or binds him to the arrangement which he had at first made." For these reasons and on these authorities, we are of the opinion, in the present case, that *prima facie* the mother is entitled as guardian, for nurture, to have her child delivered over to her. Still she may have forfeited her right by prior immoral conduct, or proof that she does not make the application *bona fide*, or by having some illegal act in view when she has obtained the possession of the child. According to *Rex v. Greenhill*, 4 A. & E. 624, (E. C. L. R. vol. 31) the immorality, to extinguish the right of the parent or guardian to the

custody of the child, must be of a gross nature, so that the child would be in serious danger of contamination by living with him. But here no immorality whatever is imputed to Mrs. Race; and she seems to have been a virtuous woman, well deserving the ardent affection which her husband felt for her. An attempt is made to show that in applying for this writ, she is a mere tool in the hands of others. But, on carefully looking through the affidavits, we do not see that this charge is at all substantiated; and we think that we are bound to give credit to what she swears as to the purity and sincerity of her motives. In wishing to take her children from these Protestant schools, she may act conscientiously, although not prudently; and, when the boy was allowed to go, she might not unnaturally desire to have the girl also that they might be educated together. The answer to this application, if there be any, we think must rest upon the ground that the mother was under a legal obligation to educate her children in the Protestant faith, and that she now seeks to get possession of the daughter, with the intention of following a course with her which the law forbids. Had she been a testamentary guardian, and the will had directed that the children should be educated as Protestants, we should not have ordered the girl to be delivered up to the guardian—she intending to send the girl to a Roman Catholic Seminary. But she is guardian for nurture, with all the rights belonging to a mother as the surviving parent. The husband certainly was a Protestant; his children had been baptized in the Anglican church; and he probably expected that they would be brought up as Protestants. But his will is entirely silent upon this question; and, in his most beautiful and affecting letter of the 25th of August, 1854, (showing him to have been a model of a Christian soldier) he appears to have had unbounded confidence in her, and to have left the education of the children entirely in her discretion. Indeed, by marrying a Roman Catholic, and by permitting the children in his lifetime to join in Roman Catholic prayers, he does not seem to have had the horror of popery felt by many pious Protestants. Still, if the proposition laid down can be supported, that it was her duty as guardian for nurture, from the simple fact of the father having been a Protestant, to educate the children as Protestants, she would be contemplating what the law forbids by wishing to remove the children from a Protestant to a Roman Catholic school. But no sufficient authority has been cited in favor of this proposition; and the mother becoming the guardian for nurture on the death of the father, no provision to the contrary being made by will, she appears to us to have in all respects the same parental authority which might have been exercised by the father had he survived the mother. As the law stands, since the repeal of the statutes for persecuting Papists, the question must be the same under the

actual circumstances of this case as if the father had died a Roman Catholic, and the mother surviving had been a Protestant; would it, in that case, have been unlawful for the mother to have brought up the children as Protestants? The cases of *Villareal v. Mellish*, 2 Swanst. 533, and *Talbot v. Earl of Shrewsbury*, 4 Myl. & Cr. 672, show that in such matters the courts know of no such distinction between different religions, and will not interfere with the discretion of guardians as to the faith in which they educate their wards. The authority relied upon to show, that the ward must invariably be educated in the faith of the father, is *In re Arabella Frances North*, 11 Jurist 7, before Vice Chancellor Knight Bruce. That case arising jointly on a return to a *habeas corpus*, and on a petition for the appointment of a guardian to children as wards of the Court of Chancery, it is difficult to distinguish what was done or said by the vice chancellor as a common law and an equity judge. He cannot be alleged to have decided anything upon this point; and he had only to consider it with a view to determining whether the children should for a few days, till a guardian was appointed, be in custody of a Roman Catholic or a Protestant nurse. He certainly does draw an inference of fact that the father died a Protestant, although for some time before his death, he had conformed to the worship of the Roman Catholic Church, and when dying he would not permit the ministration of a Protestant clergyman; and his Honour does express an opinion that, although the wife had been formally admitted into the Roman Catholic Church, the children must be educated in the Protestant faith, the father having given no directions upon the subject by will. But this doctrine, if well founded, would only apply to the education of wards of the court of chancery, respecting whom an equity judge, representing the queen, as *parens patriae*, has a very large discretion, and may give directions beyond the scope of the duties of a guardian for nurture under the common law. Therefore, without venturing to question the *dictum* of so eminent a judge (although it seems not altogether to accord with what was said by Lord Cottenham, C., in *Talbot v. Earl of Shrewsbury*, 4 M. & C. 672,) we do not think it enough to show that the mother of this infant, as guardian for nurture, was legally bound to educate the children as Protestants, or that she can be charged with an illegal purpose when intending to send them to a Roman Catholic school. The commissioners in detaining this girl from her mother have no doubt acted from the most laudable motives; but they are wrong in point of law, in supposing that the mother, by committing the child to their care to be educated, has lost all right over her. In the case cited from the Year Books, (*supra*) it was held that, "if a guardian by reason of nurture, delivers the infant to another for instruction, he may afterwards retake the infant:" and this is vouched for good law by Lord Chief Baron Comyns in his Digest.

It might be every way better for this child to remain in the school at Hampstead, which appears to be in all respects so admirably conducted; and we may individually deplore her removal from it; but upon this matter, as there is nothing contrary to law in contemplation, we have no jurisdiction to determine; and we think we are bound, in the discharge of our official duty, to order that the infant Alicia Race, be now delivered up to her mother. We trust that she will ever be treated by her mother with the affection and tenderness anticipated by the father in the letter which he wrote, when he foresaw that he was soon to fall in the defence of his country.

Ordered accordingly.

Father's right to custody of child.—Tarble, *In re*, 25 Wis. 390; Commonwealth v. Blatt, 165 Pa. St. 213; Rex. v. Greenhill, 4 A. & E. 624; Rex v. De Manneville, 5 East, 221; People v. Gaul, 44 Barb. (N. Y.) 98; Holyoke v. Haskins, 5 Pick. (Mass.) 20, 26; Jones v. Darnall, 103 Ind. 569; Brinster v. Compton, 68 Ala. 299; People v. Mercein, 3 Hill (N. Y.), 399; State v. Richardson, 40 N. H. 272; Barry, *In re*, 42 Fed. 113.

Mother's right to such custody.—Macready v. Wilcox, 33 Conn. 321, 328; Armstrong v. Ston, 9 Grat. (Va.) 102; Copeland v. State, 60 Ind. 394; Moore v. Christian, 56 Miss. 408; Buckley v. Perrine, 54 N. J. Eq. 285; Freeman, *In re*, 54 Kans. 493.

While at common law the father's right to the custody of the child was generally sustained without question, the modern practice, especially in this country has modified the old legal principle by regarding more closely the welfare of the infant and the rights of the mother. Brooke v. Logan, 112 Ind. 183; Richards v. Collins, 45 N. J. Eq. 283; Merritt v. Swimley, 82 Va. 433; Sturtevant v. State, 15 Neb. 459; Corrie v. Corrie, 42 Mich. 509; Washaw v. Gimble, 50 Ark. 351; Doyle, *In re*, 16 Mo. App. 159; Clark v. Bayer, 32 Oh. St. 299; State v. Kirkpatrick, 54 Iowa, 373; Reeves v. Reeves, 75 Ind. 342; Delano, *In re*, 37 Mo. App. 185; Pray, *In re*, 60 How. Pr. (N. Y.) 194.

5. In contempt cases.

PASSMORE WILLIAMSON'S CASE.

1855. SUPREME COURT OF PENNSYLVANIA. 26 Pa. St. 9.

(PETITIONER was a citizen of Philadelphia and secretary of the "Pennsylvania Society for Promoting the Abolition of Slavery, etc." One Col. Wheeler, a citizen of Virginia, brought to Philadelphia certain slaves and petitioner informed said slaves that they were free by the laws of Pennsylvania, and, they leaving their master, petitioner and others prevented the latter from interfering with their departure. Wheeler later sued out a writ of *habeas corpus* in the District Court of the United States directed to the petitioner commanding him to produce the bodies of said slaves. Petitioner

made return that said persons were not and never had been in his custody. The court adjudged the return to be insufficient and ordered petitioner committed to jail without bail for a contempt in refusing to obey said writ. * Petitioner now sued out the writ in his own behalf.)

The opinion of the court was delivered by BLACK, J.

This is an application by Passmore Williamson for a writ of *habeas corpus*. He complains that he is held in custody under a commitment of a District Court of the United States, for a contempt of that court in refusing to obey its process. The process which he is confined for disobeying was a *habeas corpus* commanding him to produce the bodies of several colored persons claimed as slaves under the laws of Virginia.

Is he entitled to the writ he has asked for? In considering what answer we shall give to this question, we are, of course, expected to be influenced, as in other cases, by the law and the constitution alone. The gentlemen who appeared as counsel for the petitioner, and who argued the motion in a manner which did them great honor, pressed upon us no considerations, except those which were founded upon their legal views of the subject.

It is argued with much earnestness, and no doubt with perfect sincerity, that we are bound to allow the writ, without stopping to consider whether the petitioner has or has not laid before us any probable cause for supposing that he is illegally detained—that every man confined in prison, except for treason or felony, is entitled to it, *ex debito justitiæ*,—and that we cannot refuse it without a frightful violation of the petitioner's rights, no matter how plainly it may appear on his own showing, that he is held in custody for a just cause. If this be true, the case of *Ex parte Lawrence*, 5 Binn. 304, is not law. There the writ was refused, because the applicant had previously been heard before another court. But if every man who applies for a *habeas corpus* must have it, as a matter of right, and without regard to anything but the mere fact that he demands it, then a court or a judge has no more power to refuse a second than a first application.

Is it really true that the special application which must be made for every writ of *habeas corpus*, and the examination of the commitment, which we are bound to make before it can issue, are mere hollow and unsubstantial forms? Can it be possible that the law and the courts are under the control so completely of their natural enemies that every class of offenders against the Union or the State, except traitors and felons, may be brought before us as often as they please, though we know beforehand, by their own admissions, that we cannot help but remand them immediately? If these questions must be answered in the affirmative, then we are compelled, against our will and contrary to our convictions of duty, to wage a

constant warfare against federal tribunals by firing off writs of *habeas corpus* upon them all the time. The punitive justice of the state would suffer still more seriously. The half of the Western Penitentiary would be before us at Philadelphia and a similar proportion at Cherry Hill and Moyamensing would attend our sittings at Pittsburg. To remand them would do very little good; for a new set of writs would bring them all back again. A sentence to solitary confinement would be a sentence, that the convict should travel for a limited term up and down the state, in company with the officers who might have him in charge. By the same means the inmates of the lunatic asylums might be temporarily enlarged, much to their own detriment; and every soldier or seaman in the service of the state and country could compel their commanders to bring them before the court six times a week.

But the *habeas corpus* act has never received such a construction. It is a writ of right, and may not be refused to one who shows a *prima facie* case entitling him to be discharged or bailed; *but he has no right to demand it who admits that he is in legal custody for an offence that is not bailable; and he does make what is equivalent to such an admission when his own application, and the commitment referred to in it, show that he is lawfully detained.* A complaint must be made, and the cause or detainer submitted to a judge, before the writ can go. The very object and purpose of this is to prevent it from being trifled with by those who have manifestly no right to be set at liberty. It is like a writ of error in a criminal case, which the court or judge is bound to allow, if there be reason to suppose that an error has been committed, and equally bound to refuse, if it be clear that the judgment must be affirmed.

We are not aware that any application to this court for a writ of *habeas corpus* has ever been successful, where the judges, at the time of the allowance, were satisfied that the prisoner must be remanded. The petitioner's counsel say that there is but one reported case in which it was refused, and this fact is given in the argument as a reason for supposing that in all other cases the writ was issued without examination. But no such inference can fairly be drawn from the scarcity of judicial decisions on a point like this. We do not expect to find in reports so recent as ours those long established rules of law, which the student learns from his elementary books, and which are constantly acted upon without being disputed.

The *habeas corpus* is a common law writ, and has been used in England from time immemorial, just as it is now. The statute of 31 Car. 2, c. 2, made no alteration in the practice of the courts in granting these writs: (3 Barn. & Ald. 420-2; Chitty's Rep. 207). It is merely provided that the judges in vacation should have the powers which the courts had previously exercised in term time (1

Chitty Gen. Prac. 586) and inflicted penalties upon those who should defeat its operation. The common law upon this subject was brought to America by the colonists; and most, if not all the states, have since enacted laws resembling the English Statute of Charles II in every principal feature. The constitution of the United States declares that "the privilege of a writ of *habeas corpus* shall not be suspended unless, when in the case of rebellion or invasion, the public safety may require it." Congress has conferred upon the Federal Judges the power to issue such writs according to the principles and rules regulating it in other courts. Seeing that the same general principles of common law prevail in England and America, and seeing also the similarity of statutory regulations in both countries, the decisions of the English judges as well as the American courts, both state and federal, are entitled to our fullest respect as settling and defining our powers and duties.

Blackstone (3 Com. 132) says that the writ of *habeas corpus* should be allowed only when the court or judge is satisfied that the party hath probable cause to be delivered. He gives cogent reasons why it should not be allowed in any other case, and cites with unqualified approbation the precedent set by Sir Edward Coke and Chief Justice Vaughan in cases where they had refused it. Chitty lays down the same rule (1 Cr. Law 101; 1 Gen. Pr. 686-7.) It seems to have been acted upon by all the judges. The writ was refused in *Rex v. Sheiner* (Burr. 765, and in the case of three Spanish Sailors (2 Black's R. 1324.) In *Hobhouse's case* (3 Barn. & Ald. 420) it was unanimously settled by the court as the true construction of the statute, that the writ is never to be allowed, if upon view of the commitment, it be manifest that the prisoner must be remanded. In New York when the statute in force there was precisely like ours (so far, I mean, as this question is concerned), it was decided by the Supreme Court (5 Johns. 382) that the allowance of the writ was a matter within the discretion of the court, depending on the grounds laid in the application. It was refused in *Husted's case*, (1, 2 Com. 136) and in *Ex parte Ferguson* (9 Johns. R. 139). In addition to this we have the opinion of Chief Justice Marshall in *Watkin's case* (3 Peters 202) that the writ ought not to be awarded if the court is satisfied that the prisoner must be remanded. It was accordingly refused by the Supreme Court of the United States in that case, as it had been before in *Kearney's case*.

On the whole we are thoroughly satisfied that our duty requires us to view and examine the cause of detainer now, and to make an end of the business at once, if it appears that we have no power to discharge him on the return of the writ.

The prisoner, as already said, is confined on a sentence of the district court of the United States, for a contempt. A *habeas*

corpus is not a writ of error. It cannot bring a case before us in such a manner that we can exercise any kind of appellate jurisdiction in it. On a *habeas corpus*, the judgment even of a subordinate state court cannot be disregarded, reversed, or set aside, however clearly we may perceive it to be erroneous, and however plain it may be that we ought to reverse it if it were before us on appeal or writ of error. We can only look at the record to see whether a judgment exists, and have no power to say whether it is right or wrong. It is conclusively presumed to be right until it is regularly brought up for revision. We decided this three years ago at Sunbury, in a case which we all thought one of much hardship. But the rule is so familiar, so universally acknowledged, and so reasonable in itself, that it requires only to be stated. It applies with still greater force, or at least for much stronger reasons, to the decisions of the federal courts. Over them we have no control at all, under any circumstances, or by any process that could be devised. Those tribunals belong to a different judicial system from ours. They administer a different code of laws and are responsible to a different sovereignty. The district court of the United States is as independent of us as we are of it—as independent as the Supreme Court of the United States is of either. What the law and the constitution have forbidden us to do directly on writ of error, we, of course, cannot do indirectly by the writ of *habeas corpus*.

But the petitioner's counsel have put this case upon the ground that the whole proceeding against him in the district court was *coram non iudice*, null and void. It is certainly true that a void judgment may be regarded as no judgment at all; and every judgment is void, which clearly appears on its own face to have been pronounced by a court having no jurisdiction or authority in the subject matter. For instance, if a federal court should convict and sentence a citizen for libel; or if a state court, having no jurisdiction except in civil pleas should try an indictment for crime and convict the party—in these cases the judgment would be wholly void. If the petitioner can bring himself within this principle, then there is no judgment against him; he is wrongfully imprisoned, and we must order him to be brought out and discharged.

What is he detained for? The answer is easy and simple. The commitment shows that he was tried, found guilty, and sentenced for contempt of court, and nothing else. He is now confined in execution of that sentence, and for no other cause. This was a distinct and substantive offense against the authority and government of the United States. Does any one doubt the jurisdiction of the district court to punish for contempt? Certainly not. All courts have this power, and must necessarily have it; otherwise they could not protect themselves from insult, or enforce obedience

to their process. Without it, they would be utterly powerless. The authority to deal with an offender of this class belongs exclusively to the court in which the offence is committed; and no other court, not even the highest, can interfere with its exercise, either by writ of error, mandamus or *habeas corpus*. If the power be abused there is no remedy but by impeachment. The law was so held by this court in *McLaughlin's case*, 5 W. & Ser. 276, and by the Supreme Court of the United States in *Kearney's case*, 7 Wheaton 38. It was solemnly settled as part of the common law in *Brass Crosby's case*, 3 Wilson 183, by a court in which sat two of the foremost jurists that England ever produced. We have not the smallest doubt, that it is the law; and we must administer it as we find it; The only attempt ever made to disregard it was by a New York judge (4 Johns. R. 345) who was not supported by his brethren. This attempt was followed by all the evil and confusion, which Blackstone and Kent, and Story declared to be its necessary consequences. Whoever will trace that singular controversy to its termination will see, that the chancellor and a majority of the supreme court, though once outvoted in the senate, were never answered. The senate itself yielded to the force of the truths which the supreme court had laid down so clearly, and the judgment of the court of errors in *Yeates' case*, 6 Johns. 503, was overruled by the same court a year afterwards in *Yates v. Lansing*, 9 Johns. R. 423, which grew out of the very same transaction, and depended on the same principles. Still further reflection at a later period induced the senate to join the popular branch of the legislature in passing a statute which effectually prevents one judge from interfering by *habeas corpus* with the judgment of another on the question of contempt.

These principles being settled, it follows irresistibly, that the district court of the United States had power and jurisdiction to decide what acts constitute a contempt against it; to determine whether the petitioner has been guilty of a contempt, and to inflict upon him, the punishment, which in its opinion, he ought to suffer. If we fully believed the petitioner to be innocent—if we were sure that the court that convicted him misunderstood the facts, or misapplied the law—still we could not re-examine the evidence, or re-judge the justice of the case, without grossly disregarding what we know to be the law of the land. The judge of the district court decided the question on his own constitutional responsibility. Even if he could be shown to have acted tyrannically, he would be called to answer for it only in the Senate of the United States.

But the counsel of the petitioner go behind the proceedings in which he was convicted, and argue that the sentence for contempt, is void, because the court had no jurisdiction of a certain other

matter, which it was investigating or attempting to investigate, when the contempt was committed. We find a judgment against him in one case; and he complains about another, in which there is no judgment. He is suffering for an offence against the United States; and he says that he is innocent of any wrong to a particular individual. He is conclusively adjudged guilty of a contempt; and he tells us that the court has no jurisdiction to restore Mr. Wheeler's slaves.

It must be remembered that contempt of court is a specific criminal offence. It is punished sometimes by indictment, and sometimes in a summary proceeding, as it was in this case. In either mode of trial, the adjudication against the offender is a conviction, and the commitment in consequence is an execution; 7 Wheaton 38. This is well settled, and I believe has never been doubted. Certainly the learned counsel for the petitioner, have not denied it. The contempt may be connected with some particular cause, or it may consist in misbehavior, which has a tendency to obstruct the administration of justice generally. When it is committed in a pending cause, the proceeding to punish it is a proceeding by itself. It is not entitled in the cause pending, but on the criminal side; (Wall. 134). The record of a conviction for a contempt is as distinct from the matter under investigation, when it was committed, as an indictment for perjury is from the cause in which the false oath was taken. Can a person, convicted of perjury, ask us to deliver him from the penitentiary, on showing that the oath, on which the perjury is assigned, was taken in a cause of which the court had no jurisdiction? Would any judge in the Commonwealth listen to such a reason for treating the sentence as void? If, instead of swearing falsely, he refuses to be sworn at all, and he is convicted not of perjury, but of contempt, the same rule applies and with a force precisely equal. If it be really true that no contempt can be committed against a court while it is inquiring into a matter beyond its jurisdiction, and if the fact was so in this case, then the petitioner had a good defence; and he ought to have made it on his trial; to make it after conviction is too late. To make it here is to produce it before the wrong tribunal.

Every judgment must be conclusive until reversed. Such is the character, nature and essence of all judgments. If it be not conclusive it is not a judgment. A court must either have power to decide a given question finally and for ever, so as to preclude any further inquiry upon it, or else it has no power to make any decision at all. To say that a court may determine a matter and that another court may regard the same matter afterwards as open and undetermined, is an absurdity in terms.

It is most especially necessary that convictions for contempt in

one court shall be final, conclusive, and free from re-examination by other courts on *habeas corpus*. If the law were not so, our judicial system would break to pieces in a month. Courts totally unconnected with each other would be coming in constant collision. The inferior courts would revise all the decisions of the judges placed over and above them. A party unwilling to be tried in this court, need only defy our authority, and if we commit him, to take out his *habeas corpus* before an inferior judge of his own choosing, and if that judge is of opinion that we ought not to try him, there is an end of the case.

This doctrine is so plainly against the reason of the thing that it would be wonderful indeed if any authority for it could be found in the books. There is none except the overruled decision of Mr. Justice Spencer, of New York, already referred to, and some efforts of the same kind to control the other courts, made by Sir Edward Coke, in the King's Bench, which are now universally admitted to have been illegal, as well as rude and intemperate. On the other hand, we have all the English judges, and all our own, declaring their want of power to interfere with or control one another in this way. I will content myself by simply referring to some of the books in which it is established that the conviction of contempt is a separate proceeding, and is conclusive of every fact which might have been urged on the trial for contempt, and among others want of jurisdiction to try the cause in which the contempt was committed; 4 Johns. R. 325, *et seq.*; the opinion of Chief Justice Kent on pages 370 and 375; 6 Johns. 503; 9 Johns. 423; 1 Hill 170; 5 Iredell 199; *Id.* 153; 2 Sandf. 724; 1 Carter 160; 1 Blackf. 166; 25 Miss. 836; 2 Wheeler's Criminal Cases, p. 1; 14 Ad. & El. 558. These cases will speak for themselves but I may remark as to the last one that the very same objections were made there and here. The party was convicted of contempt in not obeying a decree. He claimed his discharge on *habeas corpus* because the chancellor had no jurisdiction to make the decree, being interested in the cause himself. But the court of Queen's Bench held that if that was a defence it should have been made on the trial for contempt, and the conviction was conclusive. We cannot choose but hold the same rule here. Any other would be a violation of the law which is established and sustained by all authority and by all reason.

But certainly the want of jurisdiction alleged in this case would not even have been a defence on the trial. The proposition that a court is powerless to punish for disorderly conduct or disobedience of its process in a case, which it ought ultimately to dismiss for want of jurisdiction, is not only unsupported by judicial authority, but we think that it is new even as an argument at the bar. We ourselves have heard many cases through and through

before we became convinced that it was our duty to remit the parties to another tribunal. But we never thought that our process could be defied in such cases more than in others.

There are some cases in which the want of jurisdiction would be seen at the first blush; but there are others in which the court must inquire into all the facts before it can possibly know whether it has jurisdiction or not. Any one who obstructs or baffles a judicial investigation for that purpose is unquestionably guilty of a crime for which he may and ought to be tried, convicted, and punished. Suppose a local action to be brought in the wrong county; this is a defence to the action but a defence which must be made out like any other. While it is pending, neither a party, nor an officer, nor any other person, can safely insult the court, or resist its order. The court may not have power to decide upon the merits of the case; but it has undoubted power to try whether the wrong was done within its jurisdiction or not. Suppose Mr. Williamson to be called before the circuit court of the United States as a witness in a trial for murder, alleged to be committed on the high seas. Can he refuse to be sworn, and at his trial for contempt justify himself on the ground that the murder was in fact committed within the limits of a state, and therefore triable only in a state court? If he can, he can justify perjury for the same reason. But such a defence for either crime has never been heard of since the beginning of the world. Much less can it be shown after conviction, as a ground for declaring the sentence void.

The writ which the petitioner was convicted of disobeying was legal on its face. It enjoined upon him a simple duty, which he ought to have understood and performed without hesitation. That he did not do so is a fact conclusively established by the adjudication which the court made upon it. I say the writ was legal, because the act of congress gives to all the courts of the United States the power "to issue writs of *habeas corpus* when necessary for the exercise of their jurisdiction, and agreeably to the principles and usages of law." Chief Justice Marshall decided in Burr's trial, that the principles and usages referred to in this act were those of the common law. A part of the jurisdiction of the district court consists in restoring fugitive slaves; and the *habeas corpus* may be used in aid of it when necessary. It was awarded here upon the application of a person who complained that his slaves were detained from him. Unless they were fugitive slaves they could not be slaves at all, according to the petitioner's own doctrine and if the judge took that view of the subject, he was bound to award the writ. If the persons mentioned on it had turned out, on the hearing, to be fugitives from labor, the duty of the district judge to restore him, or his power to bring them

before him on a *habeas corpus*, would have been disputed by none except the very few who think that the constitution and law on that subject ought not to be obeyed. The duty of the court to inquire into the facts on which its jurisdiction depends is as plain as is its duty not to exceed it when it is ascertained. But Mr. Williamson stopped the investigation *in limine*; and the consequence, is, that everything in the case remains unsettled. Whether the persons named in the writ were slaves or free—whether Mr. Wheeler was the owner of them—whether they were unlawfully taken from him—whether the court had jurisdiction to restore them—all these points are left open for the want of a proper return. It is not our business to say how they ought to be decided but we do not doubt that the learned and upright magistrate who presides in the district court, would have decided them as rightly as any judge in the country. Mr. Williamson had no right to arrest the inquiry because he supposed that an error would be committed on the question of jurisdiction, or any other question. If the assertions which his counsel now make on the law and the facts be correct, he prevented an adjudication in favor of his proteges, and thus did them a wrong which is probably a greater offence in his own eyes than anything he could do against Mr. Wheeler's rights. There is no reason to believe that any trouble whatever would have come out of the case if he had made a true, full and special return of all the facts; for then the rights of all parties, white and black, could have been settled or the matter dismissed for want of jurisdiction, if the law so required.

It is argued that the court had no jurisdiction, because it is not averred that the slaves were fugitives, but merely that they owed service by the laws of Virginia. Conceding, for the argument's sake, that this was the only ground on which the court could have interfered—conceding also that it is not substantially alleged in the petition of Mr. Wheeler—the proceeding was, nevertheless, not void for that reason.

The federal tribunals, though courts of limited jurisdiction, are not inferior courts. Their judgments until reversed by the proper appellate court, are valid and conclusive upon the parties, though the jurisdiction be not alleged in the pleadings, nor in any part of the record; so Wheaton 192. Even if this were not settled and clear law, it would still be certain, that the fact on which jurisdiction depends need not be stated in the process. The want of such a statement in the body of the *habeas corpus*, or in the petition on which it was awarded, did not give Mr. Williamson a right to treat it with contempt. If it did, then the courts of the United States must set out the ground of their jurisdiction in every *subpoena* for a witness; and a defective or untrue averment will authorize the witness to be as contumacious as he sees fit.

But all that was said in the argument about the petition, the writ, and the facts which were proved, or could be proved, refers to the evidence, on which the conviction took place. This has passed *in rem adjudicatam*. We cannot go one step behind the conviction itself. We could not reverse it if there had been no evidence at all. We have no more authority in law to come between the prisoner and the court, to free him from sentence like this, than we would have to countermand an order issued by the commander-in-chief of the United States army. We have no authority, jurisdiction or power, to decide anything here except the simple fact that the district court had power to punish for a contempt a person who disobeys its process—that the petitioner is convicted of such contempt—and that the conviction is conclusive upon us. The jurisdiction of the court on the case which had been before it, and everything else which preceded the conviction, are out of our reach, and they are not examinable by us, and of course not now intended to be decided.

There may be cases in which we ought to check usurpation of power by the federal courts. If one of them should presume, upon any pretence whatever, to take out of our hands a prisoner convicted of contempt in this court, we would resist it by all proper and legal means. What we would not permit them to do against us we will not do against them. We must maintain the rights of the state and its courts; for to them alone can the people look for a competent administration of their domestic concerns; but we will do nothing to impair the constitutional vigor of the general government, which is "the sheet anchor of our peace at home and our safety abroad."

Some complaint was made in the argument about the sentence being for an indefinite time. If this were erroneous it would not avail here; since we have as little power to revise the judgment for that reason as for any other. But it is not illegal nor contrary to the usual rule in such cases. It means commitment until the party shall make proper submission: 3 Ld. Raym. 1108; 4 Johns. 375. The law will not bargain with anybody to let its courts be defied for a specified term of imprisonment. There are many persons who would gladly purchase the honors of martyrdom in a popular cause at almost any given price, while others are deterred by the mere show of punishment. Each is detained until he finds himself willing to conform. This is merciful to the submissive and not too severe to the refractory. The petitioner, therefore, carries the key of his prison in his own pocket. He can come out when he will, by making terms with the court that sent him there. But if he chooses to struggle for a triumph—if nothing will content him but a clean victory or a clean defeat—he cannot expect us to aid him. Our duties are of a widely different kind. They con-

sist in discouraging, as much as in us lies, all such contests with the legal authorities of the country. * * *

(Concurring opinion by LOWRIE, J., omitted.)

That the function of *habeas corpus* in cases where persons are committed for contempt of court extends only to an inquiry into the jurisdiction of the court by whom the commitment was ordered and into the validity of process upon which confinement is made. Cooper, *In re*, 32 Vt. 253; Robb v. McDonald, 29 Iowa, 330; Reed, *Ex parte*, 100 U. S. 13; People v. Cas-sels, 5 Hill (N. Y.), 164; Bissell, *In re*, 40 Mich. 63; Goodin, *Ex parte*, 67 Mo. 637; Sam, *Ex parte*, 51 Ala. 34; People v. Jacobs, 66 N. Y. 8; People v. Perfinbrink, 96 Ill. 68; Maulsby, *Ex parte*, 13 Md. 625; Havlik, *In re*, 45 Neb. 747; Cohn, *Ex parte*, 55 Cal. 193; Mason, *Ex parte*, 16 Mo. App. 41; Terry, *Ex parte*, 128 U. S. 289; Clark, *Ex parte*, 110 Cal. 405; Millett, *Ex parte*, 37 Mo. App. 76; People v. Sheriff, 29 Barb. (N. Y.) 622; Rosenberg, *In re*, 90 Wis. 581; Stokes, *In re*, 5 S. Car. 71.

6. To secure release on bail.

STATE v. JAMES E. EVERETT.

STATE v. BENJAMIN POTTER.

1838. COURT OF APPEALS OF SOUTH CAROLINA. Dudley 295.

EARLE, J., delivered the opinion of the court.

The points presented in these two cases are the same, and they will therefore be considered together.

The defendants in both cases were brought up before a judge in chambers on *habeas corpus*. The cause shown in each case, on the return of the writ, was a warrant of commitment, under the seal of a justice of quorum. In the case of Everett, the charge was stated, that the defendant "was charged before A. H. Brown, on the oath of A. Gibson, from circumstances, with larceny of bank bills of the Union Bank of Florida, valued at \$70, there being other bills lost, and one \$50 and one \$20 bill being found on the person of the said Everett." In Potter's case, that he "was charged before me upon the oath of Captain Ross, with having committed larceny." Both warrants commenced and concluded in legal forms, and in every other particular were technically correct. In the case of Everett, a motion was made on the return of the writ, for his discharge, on the ground that the warrant contained no direct and certain charge of felony or any other offence; and in the case of Potter, a like motion was made, on the ground, that the charge in the warrant was uncertain and insufficient; and both defendants

were discharged, not from confinement on bail for their appearance, but were set at liberty to go without day.

No decision that can be made by this court, will recapture the defendants, and bring them to justice. But it has been urged upon us by the attorney general to express an opinion which may prevent their former discharge from being urged in their behalf, in case they should be retaken, and may serve to guide magistrates in like cases.

At this day one would hardly suppose that a question could arise on the subject of proceedings under the *Habeas Corpus* Act, and yet there does seem to be a popular misapprehension in relation to them, indicating the belief that the *Habeas Corpus* Act is a sort of relief law—a summary general jail delivery.

The object of the statute was to provide a mode of relief from unlawful imprisonment; a confinement without lawful warrant, without legal cause, on vague, indefinite and uncertain charges. But the protection intended by the act, goes no farther than an enlargement on bail for the appearance of the prisoner at the next sessions; and it is not every prisoner that can claim even this enlargement *ex debito justitiae*. Under the act, in the very section which provides for the issuing the writ, an important exception gives character to the whole proceeding—"unless the commitment aforesaid were for treason or felony, plainly and specially expressed in the warrant of commitment," on the return of the writ, with the warrant of detention, the judge "shall discharge the said prisoner from his imprisonment, taking his recognizance for his appearance, with one or more surety or sureties in any sum according to his discretion," etc., "unless it shall appear that the party so committed is retained upon legal process, order or warrant out of some court that hath jurisdiction of criminal matters, or by some warrant, signed and sealed by the justice of the peace, for such matters or offences for the which, by the law, the prisoner, is not bailable." The object therefore is to ascertain the cause of arrest and imprisonment, and to obtain bail if the offence be one for which bail is allowed. Grand larceny is a felony, for which bail is not granted of course, and I apprehend few cases can be found since the case of — in Lord Mansfield's time, where one caught with the stolen goods upon him, has not been committed to jail.

In the cases before us, the warrants do contain an explicit charge of a distinct and specified offence. In the case of Everett it is for "felony plainly and specially expressed," for which by the law the prisoner was not bailable, stating in fact that he had the stolen goods upon him. By virtue, therefore, of any powers delegated by the *Habeas Corpus* Act, such a person could not be bailed, much less released and set at liberty to go without day.

In the case of Potter, the charge is—that the prisoner had committed larceny, without any facts or circumstances to show whether it was grand or petit larceny. In such case, in favor of liberty, without more appearing from the depositions or examinations, I should regard it as a charge of petit larceny, and admit to bail. Potter, therefore, should have been admitted to bail and not released. We think the warrants of commitment are sufficiently certain in both cases. It is a great mistake to suppose that a warrant for the apprehension or a warrant of commitment, need contain any statement at all, of the evidence on which it is founded, or need enumerate any of the facts and circumstances accompanying the offence. There are several high authorities that it need not even contain a specification of the particular offence. But the better opinion, as well as the general and approved practice, is that it should state the offence with convenient certainty, that it should not be for felony generally, but should contain the special nature of the felony. As for felony for the death of J. S. or burglary in breaking the house of J. S. But supposing the offence to have been described with too little certainty, it should have been regarded as good cause for admitting the party to bail.

Independently, however, of the *Habeas Corpus* Act, the court of sessions by virtue of its general powers in criminal matters, may in term time or at chambers, admit a prisoner to bail, in all offences and felonies whatever. It is a great power, and is to be exercised with discretion. But, said Lord Mansfield on application for bail in a celebrated case, “discretion when applied to a court of justice, means sound discretion guided by law; it must be governed by rule, not by humor; it must not be arbitrary, vague and fanciful, but legal and regular.” And here it may not be amiss to show the practice of the English courts on this subject.

One came up on *Habeas Corpus* charged with a commitment for robbery on the highway, the prosecutor attending insisted he was the man, and although eight affidavits of credible persons, proving him to be at another place at the time of the robbery, were read, yet the court refused to admit him to bail, and remanded him until the assizes; 2 Strange 1138.

But the court will look into the depositions, and bail accordingly; and, if committed for manslaughter, yet if the depositions made it murder, the court will not bail, and *e converso*. *Ib.* 1242.

And in *Rex v. Juda*, 2 T. R. 225, the discharge of the prisoner was moved for, because the word “feloniously” was omitted in the commitment, which was for a statutory offence, stating the circumstances supposed to create the offence. Ashhurst, J., said, “unless it appears on the face of the commitment itself, that the defendant is charged with a felony, we are bound by the *habeas corpus* act to discharge him, taking such bail as we shall think

fit according to the circumstances of the case;" and Groze, J., "it would be sufficient if upon the facts stated they could not but see that the act was feloniously committed;" in that case, the circumstances did not amount to a charge of felony, and they bailed him.

But in *King v. Marks*, 3 East B. 157, *et al.*, where the warrant of commitment contained an insufficient statement to constitute felony, and the depositions were very full, and stated the offence with sufficient precision, the court refused to bail and remanded.

In the exercise of this general power, which in England appertains to the court of King's Bench, and here to the court of general sessions, there is no doubt that a judge before whom a prisoner is brought, will look beyond the commitment, if necessary, and will bail, or remand, according to circumstances. And in admitting to bail, he should pay due regard to the statute regulating bail and should not admit to bail a person who is there expressly declared to be debarred from it, without some particular circumstances in his favor. He should not undertake to determine fully upon the guilt of a prisoner and set him at liberty, without bail and without day, however imperfectly the offence may have been charged in the commitment, or however strong the circumstances in his favor, proved by affidavits, or collected from examination. Such a power does not exist in any judge, in term time or at chambers, where any offence at all is alleged; such a power would be superior to the laws, wherever lodged. It would to all purposes be a dispensing power, as effectual and dangerous as any that has been claimed or exercised under the most arbitrary government.

We are constrained, therefore, to say that his honor who heard the motion at chambers exceeded his powers and decided erroneously, when he discharged the prisoners without trial, without bail and without day; that in the utmost latitude of his discretion, he should only have admitted them to bail; and as to Everett, that in the exercise even of that discretion, he should not have been bailed without strong circumstances in his behalf, shown by affidavit.

So far as regards the prisoners, if proceedings against them should go on, the orders to discharge them, and the other orders, are set aside and annulled.

UNITED STATES, RESPONDENT V. FOX, APPELLANT.

1880. SUPREME COURT OF MONTANA TERRITORY. 3 Mont. 512.

(PETITIONER was indicted for embezzlement, etc. At the November term he was tried on one of the indictments; the jury failed to agree. Another jury was impaneled, but one of the jurors becoming ill, the jury was discharged and the cause continued. At the March term petitioner demanded trial but because of Congress having failed to make necessary appropriations to pay the expense of serving process, the court ordered all cases to be continued at the next succeeding term.)

WADE, C. J. * * * Thereupon the defendant, after the adjournment of said March term of court, made application to the judge of said court for discharge from imprisonment upon *habeas corpus*, which was denied and he appeals to this court.

The ground upon which the petitioner bases his right to a discharge from imprisonment is that at the said March term of said court he was ready for and demanded a trial upon said several indictments, and that the United States being plaintiff in the cases, and charged with the duty of providing the necessary money therefor, and speedily prosecuting the same, failed, neglected and refused so to do at said March term, whereby the defendant was deprived of his constitutional right to a speedy trial.

I. Among the principles that adorn the common law, making it the pride of all English speaking people, and a lasting monument to the achievements of liberty over the encroachments of arbitrary power, are the following: No man can be rightfully imprisoned except upon a charge of crime properly made in pursuance of the law of the land. No man when so imprisoned upon a lawful charge presented in a lawful manner, specifying the crime, can be arbitrarily held without trial.

These principles are in accord with the enlightened spirit of the common law, and form a part of the framework of the English constitution. They are guaranteed and secured by *Magna Charta*, the petition of rights, the bill of rights, and by a long course of judicial decisions, and they belong to us as a part of our inheritance from the mother country. These rights were claimed by our ancestors in Colonial times, and they have been engrafted into and secured by our constitution the supreme law of the land, which, in article six of the amendments, provides:—

Art. VI. "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state, and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory

process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense."

Within the meaning of this article of the constitution, what is a speedy trial?

At the time of the adoption of the constitution, the common law was in force in this country so far as applicable, and the terms used in that instrument ought to be construed with reference to their common law meaning.

Some idea of the term, "speedy trial" at common law may be gathered from that fact that by that law, in order to insure the trial of all prisoners within a certain time, a patent in the nature of a letter is issued from the king to certain persons appointing them his justices, and authorizing them to deliver his jails. Bouv. Law Dict. title Gaol Delivery.

The jails are thus cleared and all offenders tried, punished or delivered twice in every year, 2 Blacks. Com. Book IV, 270, Shars. Ed.

And so it is but a reasonable inference that, at common law, if the prosecution, by its neglect and laches, fails to prosecute, and thereby detains a prisoner in jail, who ought but for such neglect to have been tried, such detention would be the denial of a speedy trial. By the common law the jails are cleared twice in each year in order to secure to the prisoners therein confined a speedy trial, and if by the neglect of the prosecution, to prepare for trial they are imprisoned for a longer period than the law contemplates, this would be the denial of a speedy trial.

Neither the constitution nor any law of congress, so far as I have been able to ascertain, fixes the time within which a person accused of crime and imprisoned shall be tried. But both the constitution and the law contemplate that a trial shall be had, after the lapse of such time as, in the exercise of reasonable diligence, may be required to prepare for trial. The adjudications upon this subject are not numerous, but a resort to general principles and the spirit of the law renders the problem easy of solution.

The law guards with jealous care the rights of a person charged with crime, and with equal care the right of the people, as a matter of security and safety, to have crime punished. Every step in a criminal prosecution must be according to law. There must be an indictment found and presented by a lawful grand jury specifying the precise charge to be tried. The accused shall be provided with counsel either by himself or the government, and he shall have the process of the court to compel the attendance of his witnesses. He is to be afforded an opportunity to prepare for his trial before an impartial jury, and when thus provided with all these means to secure a fair trial, if he, by his

neglect, fails or refuses so to do, he cannot have the same postponed, or put over because he is not ready for trial.

And so on the other hand the law will not tolerate any neglect or laches on the part of the prosecution in bringing a defendant to trial. Especially is this the case, and the principle applies with stronger force, if the person charged with the crime is in prison demanding a trial, and sufficient time has elapsed since the finding of the indictment, to enable the prosecution, in the exercise of reasonable diligence, to be ready for trial. A person charged with crime, whether in prison or on bail, has the right to demand diligence on the part of the prosecution, to the end that he may speedily know whether he is to be convicted or acquitted.

A criminal case, like a civil case, may be continued from one term to another when it satisfactorily appears that the party asking for the continuance has used reasonable diligence to be prepared for trial, and has failed, but in the absence of reasonable diligence, on the part of the party asking for the continuance, the opposite party may ask and insist upon a trial, even though such trial must necessarily result in an acquittal of the person charged with the crime. If the prosecution or defendant are not ready for trial after the lapse of a reasonable time in which to get ready, they must first relieve themselves of any neglect or laches before they can ask for a postponement of the trial.

The speedy trial, to which a person charged with a crime is entitled under the constitution, is then, a trial at such a time, after the finding of the indictment, regard being had to the terms of court, as shall afford the prosecution a reasonable opportunity, by the fair and honest exercise of reasonable diligence, to prepare for trial; and if the trial is postponed or delayed beyond such period, when there is a term of court at which the trial might be had, by reason of the neglect or laches of the prosecution in preparing for trial, such a delay is a denial to the defendant of his right to a speedy trial.

In *Ex parte Stanley*, 4 Nev. 116, the court, in defining the meaning of the term "speedy trial" says: "But what is to be understood by a speedy trial is the embarrassing question now to be determined. It is very clear that one arrested and accused of crime has not the right to demand the trial immediately upon the accusation or arrest being made. He must wait until a regular term of the court having jurisdiction of the offense with which he is charged, until an indictment is found and presented, and until the prosecution has had a reasonable time to prepare for the trial. Nor does a speedy trial mean a trial immediately upon the presentation of the indictment or the arrest upon it. It simply means that the trial shall take place as soon as possible after the indictment is found, without depriving the prosecution of a rea-

sonable time for preparation. The law is the embodiment of reason and good sense, hence, whilst it secures to every person accused of crime the right to have such charge speedily determined by a competent jury, it does not exact impossibilities, extraordinary efforts, diligence or exertion from the courts, or the representatives of the state; nor does it contemplate that the right of a speedy trial which it guaranteed to the prisoner shall operate to deprive the state of a reasonable opportunity of fairly prosecuting criminals."

In the case of *Klock v. People*, 2 Park. 676, the defendant was put upon his trial for the crime of arson. During the progress of the trial the prosecution offered certain evidence to which the counsel for the prisoner objected, and the objection was sustained, whereupon, on motion of the attorney prosecuting, and without the consent and against the objection of the accused, a jurymen was withdrawn and the jury discharged. At the ensuing term the attorney prosecuting again moved the trial of the indictment, and the defendant as a plea in bar set up the foregoing facts. On demurrer the plea was held insufficient, and the appellate court, in reversing this decision, says:—"The real question is, whether it is allowable for a public prosecutor after having entered upon his case by the giving of evidence to a jury impaneled for the trial of an indictment, to withdraw a juror and thus arrest the trial, so as to enable him to try the party at a subsequent time, solely because he finds himself unprepared with the proper evidence, to convict, when his condition is not the result of improper practice on the part of the defendant, or someone acting with and for him, or some overruling inevitable necessity."

Counsel for the people insisted that the accused could not object to a second trial for the reason that his case did not come within the constitutional provision which declares that "no person shall twice be put in jeopardy for the same offense" (art. 1, § 6), and the court says:—"The plaintiff in error has not been once tried so as to bring himself within the constitutional protection, as no verdict or judgment has been given. The true ground of the objection lies back of the constitution, and is found in the principles which have been deemed essential to the full and fair protection of individuals accused of crime, and to secure to them a speedy and impartial trial and the best means of indicating their innocence," and the decision of the court below in sustaining the demurrer to the plea in bar was reversed and the prisoner discharged.

The analogies of this case to have a bearing upon the one we are considering. If asking for and obtaining the postponement of a criminal case, for the reason that the prosecutor suddenly, during the progress of the trial, found himself unprepared to proceed,

because the evidence he had offered had been excluded from the jury, was a denial to the accused of a speedy trial, then certainly it would be a denial of a speedy trial if the prosecution (the United States in this case) had failed and neglected not only to offer any evidence whatever, but to secure the attendance of any witnesses in the case. In the case referred to there was an attempt in good faith to have a trial. In the case we are considering, a whole term of court passed without an attempt or effort whatever on the part of the prosecution to bring the case to a trial. The indictments were found at the November term 1879, and two trials were had at that term, which resulted in mistrials. At the ensuing March term the prosecution failed and neglected to bring the cases to trial, and made no effort whatever in that direction. The government failed entirely to provide any means for paying the expenses of serving process, and entirely neglected and refused to procure the attendance of witnesses on the part of the prosecution. It did no more than as though these indictments had not been pending against the defendant.

The prosecution was guilty of laches and a neglect of duty, in so failing and refusing to prosecute, and such failure was a denial to the defendant of his constitutional right to a speedy trial. The government of the United States cannot cast a man into prison and then fold its arms and refuse to prosecute.

And it is not material to inquire for what reason the government failed and neglected to prosecute these indictments, or why the appropriations of money to enable marshals to serve process failed in Congress. The fact is sufficient for the purposes of this case.

The prayer of the petition is granted and the petitioner discharged from custody and imprisonment.

See also Stange, *Ex parte*, 59 Cal. 416; Bryant, *Ex parte*, 34 Ala. 270; Randon, *Ex parte*, 12 Tex. App. 145; Commonwealth v. Keeper, etc., 2 Ashm. (Pa.) 227; People v. Tinder, 19 Cal. 539; People v. Bowe, 58 How. Pr. (N. Y.) 393; Jones, *Ex parte*, 20 Ark. 9; State v. Field, 112 Mo. 554; Turner, *Ex parte*, 36 Mo. App. 75; Bridewell, *Ex parte*, 57 Miss. 39; Cowell v. Patterson, 49 Iowa, 514.

UNITED STATES v. LAWRENCE.

1835. CIRCUIT COURT, DISTRICT OF COLUMBIA. 4 Cranch C. C. 518; 26 Fed. Cas. 887, No. 15,557.

ON the 30th of January, 1835, the prisoner, Richard Lawrence, made an assault upon the President of the United States (General Jackson) with intent to murder him, by shooting him with a pistol as he came out of the rotunda of the capitol, after having attended

the funeral service of Warran R. Davis, a member of the house of representatives. Both pistols missed fire, although the percussion caps of both exploded, and both were well loaded with powder and ball. He was arrested in the very act, and was immediately brought before the chief judge at his chambers. The assault with intent to kill was proved by the clearest kind of evidence. There was no evidence then produced of his insanity. The prisoner's manner was calm, and he seemed indifferent as to the testimony; declined cross-examining the witnesses, and when informed by the chief judge that he might make any remarks which he thought proper to make, said he could not contradict what the gentlemen had said. After inquiring as to his property and circumstances, the chief judge said to Mr. Key, the district attorney, that he supposed bail in \$1,000 would be sufficient, as it was not a penitentiary offence, there being no actual battery, and as he did not appear to have any property. Mr. Key seemed at first, to acquiesce, but having conversed with some of the president's friends who stood round him, he suggested the idea that it was not impossible that others might be concerned who might be disposed to bail him, and let him escape to make another attempt on the life of the president, and therefore thought that a larger sum should be named. The chief judge then said there was no evidence before him to induce a suspicion that there was any other person concerned in the act; that the constitution forbade him to require excessive bail; and that to require larger bail than the prisoner could give, would be to require excessive bail, and to deny bail in a case clearly bailable at law. 1 Chitty Criminal Law, 131. That the discretion of the magistrate in taking bail in a criminal case, is to be guided by the compound consideration of the ability of the prisoner to give bail, and the atrocity of the offence. That as the prisoner had some reputable friends who might be disposed to bail him, he would require bail in the sum of \$1500. This sum, if the ability of the prisoner only were to be considered is, probably too large; but if the atrocity of the offence alone were to be considered, might seem too small; but taking both into consideration, and that the punishment can only be fine and imprisonment, it seemed to him that it was as high as he ought to require. The prisoner not being able to find bail to that amount was committed for trial, by warrant of the chief judge. * * *

(So much of report of proceedings in *habeas corpus* to secure prisoner's release on ground of his insanity, and refusal of petition for said writ is omitted.)

EX PARTE DUNCAN.

1879. SUPREME COURT OF CALIFORNIA. 54 Cal. 75.

BY the court, WALLACE, C. J.:

This is an application for an order that the prisoner be let to bail "in a reasonable amount" and that the order of the Municipal Criminal Court, fixing the amount of his bail at \$113,000, be modified in respect to the sum demanded.

The petition sets forth that the prisoner is in the custody of the sheriff of the city and county of San Francisco, and confined in the jail of said city and county, awaiting his trial upon ten indictments, found against him by the grand jury, "eight of said indictments being for forgery, one for grand larceny, and one for felony in making and publishing false returns as an officer of the Pioneer Land and Loan Association, a corporation." That one of the indictments for forgery is upon a charge involving the sum of \$2,750; another, for forgery, involving the sum of \$1,750; the other six indictments for forgery committed in feloniously altering and uttering 3170 shares of the capital stock of a corporation called "The Safe Deposit Company of San Francisco;" that the market value of these shares at the time of the finding of the indictments was about eight dollars per share, and at the present time about ten dollars per share. That upon one of the indictments for forgery of said capital stock the prisoner has been twice tried, and upon each trial the jury disagreed, and were discharged without finding a verdict. That upon said trials it was claimed by the witnesses for the prosecution, holding the certificates of stock for the forgery of which six of these indictments were found, that the prisoner had obtained upon said certificates the sum of \$57,000 and no more. That the prisoner has been confined in the jail awaiting trial upon these indictments ever since the 23d day of February, 1878, and that no trial has been sought by the people, upon any of the indictments other than the one upon which the two mis-trials have occurred.

1st. The right of the prisoner to be admitted to bail upon these several indictments, none of them being for a felony capital in grade, is secured to him by the express words of the constitution. (Art. i, § 6).

2nd. And it is further declared by that instrument that excessive bail shall not be required. (*Id.*)

3rd. The prisoner has accordingly been admitted to bail by the Municipal Criminal Court in the sum of one hundred and thirteen thousand dollars, and the general question presented by the petition here is, whether this amount is, under the circumstances, to be deemed excessive within the terms and prohibition of the constitution, and must therefore be reduced.

The sole purpose which should guide the court or judge in fixing the amount of bail in any case in which bail is allowed should always be to secure the personal appearance of the accused to answer the charge as against him. It is not the intention of the law to punish an accused person, by imprisoning him in advance of his trial. Such inhumanity or injustice as inflicting punishment upon him before his guilt has been ascertained by legal means, is not to be imputed to the system of law under which we live, and the provisions found in the American constitutions, establishing the writ of *habeas corpus*, securing to accused persons imprisoned for felonies less than capital in degree the absolute right to be admitted to bail, and declaring that such bail shall not be excessive, strikingly indicate the extreme jealousy with which the common law guards the personal liberty of the citizen from unwarrantable or unnecessary restraint.

4th. But I am unable, after a careful examination of the circumstances surrounding this case, so far as they have been presented to me, to arrive at the conclusion that the amount of bail required of the prisoner is excessive. The able counsel for the prisoner who has exhausted every means that ingenuity and learning could suggest for the relief of his client, argues that the mere fact that the prisoner is unable to procure the bail demanded of him shows that it is excessive in amount, and should therefore be reduced. But I am unable to assent to that proposition. Undoubtedly the extent of the pecuniary ability of a prisoner to furnish bail is a circumstance among other circumstances to be considered in fixing the amount in which it is to be required, but it is not in itself controlling. If the position of the counsel were correct, then the fact that the prisoner had no means of his own, and no friends who were willing or able to become sureties for him, even in the smallest sum, would constitute a case of excessive bail, and would entitle him to go at large upon his own recognizance.

Upon a former occasion (January term 1879) the prisoner applied to the supreme court for an order reducing the amount of his bail, and the application was, upon consideration by all the justices, refused. (*Ex parte Duncan*, 53 Cal. 410.) Unless the circumstances now disclosed make a case materially different from the case then made to appear, I should be disinclined to depart from what was then determined. We then said (and I think that it may with propriety be repeated now) as follows:—“The question is not whether we would have exacted so great a sum in the first instance, had the proceedings to let him to bail, been originally before us—in other words the inquiry is not whether a mere difference of opinion may have been developed between this court and the Municipal Criminal Court as to the amount of bail to be ex-

acted in this case. We are not to assume in this case, the functions of the court committing the prisoner, or substitute our own for its judgment in fixing the amount of bail. Before we are authorized to interfere, the bail demanded must be *per se* unreasonably great, and clearly disproportionate to the offense involved."

Adhering as I do to the views then expressed, it remains to inquire what circumstances, if any, now disclosed, present a case materially different from the one then presented. The fact that two trial juries have been impaneled and after hearing the evidence and the instructions of the court, have disagreed and been discharged, without rendering a verdict, is relied on as furnishing a new element of the judgment to be now given. But unless I could know with certainty what evidence was given upon these trials, the fact that a disagreement in the jury box had repeatedly occurred would not go far to induce me to undo now what has been done here before in this case. The significance to be attributed to these disagreements, would be conjectural merely. One stupid or corrupt juror, upon either panel might produce a disagreement, even though the law and the evidence were clearly against the prisoner. As observed by the supreme court of Ohio, "One obstinate or corrupt person in a body of twelve will be more commonly successful in preventing a verdict than insufficient testimony." (19 Ohio 140.) Of course I am not to be understood as implying a reflection upon the gentlemen who served as jurors at these trials. I do not know who they were, and in this proceeding am not permitted to know. Again, the learned judge of the court in which these disagreements occurred, who presided at the trials and heard the evidence given has, since then, upon application made, refused to reduce the amount of bail originally fixed by him. He had heard the evidence, and had enjoyed repeated opportunities to observe its import, and I, who have had no such opportunity, can hardly be expected to overrule his judgment, as to the fair import of that evidence. His refusal to reduce the amount of bail, under the circumstances, is at least of as much significance on the one hand as is the disagreement of the juries upon the other.

5th. It is next claimed that the amount of bail required is excessive, because disproportionate to the amount which the prisoner is alleged to have obtained as the fruits of his crimes. The authorities generally hold, that, if the accused has property obtained by the commission of the crime, the bail should be for a larger amount than the value of such property; otherwise, the offender might make the crime itself an instrument for escape. This is rather indicating the minimum amount of bail to be required than determining that an amount greater than the value of the property obtained would be excessive in the sense forbidden by the constitution. It is said for the prisoner, that at the time

of the indictment, the value of the forged stock was \$29,860, and its present value \$31,700, and that \$113,000 the bail demanded, is therefore disproportionate to the amount taken by the prisoner. But if the inquiry is to be gone into in detail, it does not distinctly appear by the petition what was the sum involved in the indictment for grand larceny, nor what sum, if any, was realized by the prisoner, by reason of the making of false returns as an officer of the Pioneer Land and Loan Association. Besides, it was suggested at the argument upon the part of the people, that, in some way, twelve hundred thousand dollars of the money of the depositors of the association had disappeared, through the criminal mismanagement of the prisoner.

Upon the entire case, therefore, so far as I am permitted to look into it on this application, and in view of the judgment given by the supreme court on the former application, already referred to, I find myself unable to reach the conclusion that the bail demanded of the prisoner here is excessive, or ought, for any reason, to be reduced by my direction.

In view of the notoriety which the case of the prisoner has attained, and to prevent possible injustice to him, I think it not improper to observe that his repeated failures before the supreme court and before myself, to obtain a reduction of bail, ought not to be suffered to create an impression of his guilt in point of fact. We are not at liberty in proceedings of this nature, to investigate that question. On the contrary, we are bound by the settled rules of law, as the basis of our judgment, upon this application, to presume him guilty. (*Ex parte* Ryan, 44 Cal. 555.)

It results that the petition must be denied, and the prisoner remanded. So ordered.

That the imposition of excessive bail is equivalent to the denial of bail and to be remedied on *habeas corpus*, see: *Evans v. Foster*, 1 N. H. 374; *United States v. Brawner*, 7 Fed. 86; *Jones v. Kelly*, 17 Mass. 116; *McConnell v. State*, 13 Tex. App. 390; *Williams, In re*, 82 Cal. 183; *State v. Aucoin*, 47 La. Ann. 1677.

7. *Habeas corpus* in Extradition cases.

a.—International.

EX PARTE KAINE.

1853. U. S. CIRCUIT COURT, S. D. NEW YORK. 3 Blatchf. 1; 14 Fed Cas. 78, No. 7,597.

NELSON, Circuit Judge.—The prisoner was originally apprehended on the 15th day of June, 1852, on a warrant issued by Commissioner Bridgham, under the treaty between the United

States and Great Britain, on the 9th of August, 1842 (8 Stat. 572), on the application of Mr. Barclay, the British consul at the port of New York, upon a charge of assault upon the person of James Balfe, in Ireland, with the intent to murder. Upon hearing the allegations and the proofs, the commissioner, on the 29th of June following, found him guilty of the charge, and directed that he be detained in custody, in pursuance of the provisions of the treaty, to abide the order of the president of the United States. On the first of July a writ of *habeas corpus* was sued out by the prisoner, returnable before the United States Circuit Court for the southern district of New York, the Honorable Sam. R. Betts, district judge, presiding, founded upon an alleged illegal detention under the warrant of the commissioner. Upon a return to the writ by the marshal, and a review of the proceedings that had taken place before the commissioner, the court, after consideration, held them to be legal and valid, and, on the 9th of the same month, dismissed the writ and remanded the prisoner to the custody of the marshal, under the previous order of commitment by the commissioner. (Case No. 7598.) On the 17th of July following, the proceedings having been forwarded to the proper authorities at Washington, the acting secretary of state issued his warrant directing that the prisoner be surrendered and delivered up to Mr. Anthony Barclay, her Britannic Majesty's consul. At this stage of the proceedings an application was made before me, at chambers for a writ of *habeas corpus*, to bring up the prisoner, upon an illegal detention and imprisonment, which I refused until the whole of the proceedings that had taken place before the commissioners and the circuit court should be laid before me. These were subsequently furnished, and upon a full and complete consideration, I became convinced that the commissioner possessed no jurisdiction over the case, and that the proceedings were, in other respects, irregular and not warranted by law. But, instead of discharging the prisoner differing in opinion, as I did, from my brother in the circuit court, and deeming some of the questions involved of sufficient magnitude, and public interest, to justify the submission of them to the highest judicial tribunal in the government, I adjourned the case until the next term of the supreme court of the United States in accordance with the established practice in the King's bench of England in similar cases. Case (7597 a). That court after argument and due consideration, and for reasons which were satisfactory to me, distinguished the adjournment of the case from chambers to the term from a similar proceeding in the king's bench, on account of the limited jurisdiction of the supreme court in original proceedings, their powers being mostly appellate, and consequently dismissed the adjourned case for want of jurisdiction. The case

was, however, presented to the court in another form. An application was made for it directly by the prisoner for a writ of *habeas corpus*, the application being accompanied by the proceedings that had taken place before the commissioner and the circuit court. But the questions involved failed to meet a judicial determination, in consequence of a serious diversity of opinion among the members of the court, a majority of my brethren not concurring in the interpretation to be given to the treaty and the act of congress passed in pursuance thereof, nor in respect to the jurisdiction of the commissioner under whose order the prisoner had been committed for the purpose of his surrender to the British authorities. The application was consequently denied, and an order entered dismissing the petition. The case before me, therefore, together with the questions involved on the return of the marshal to the writ of *habeas corpus*, which were adjourned to the supreme court, having been dismissed for want of jurisdiction, or rather not having been entertained for want of it, necessarily, remained for a final hearing at chambers, as the prisoner was in custody under the authority of that writ, and must continue in such custody until discharged, or else be remanded for the purpose of being dealt with as directed by the former commitment. The hearing at chambers upon the return was adjourned, accordingly, to the first Monday of this month, and the counsel on both sides, being advised thereof, have appeared and submitted their arguments upon the several questions arising in the case.

The learned counsel appearing on behalf of the British authorities has objected that the decision of Judge Betts, sitting in the circuit court, upon the return to the writ of *habeas corpus* before that court, it being a court of competent jurisdiction to hear and determine the question whether the commitment under the commissioner's order or warrant was legal or not, is conclusive, and a bar to any subsequent inquiry, in to the same matters by virtue of this writ. I do not so understand the law. The learned counsel has referred to *Mercein v. People*, 25 Wend. 64, as an authority. The question in that case arose under a statute of the state of New York regulating the proceedings upon the writ of *habeas corpus*; and, if the decision there is as supposed, it would not be an authority to govern this case. The question there, however, which arose upon the proceedings of a father to obtain the possession of an infant child from the custody and care of the mother, who had separated from her husband is not analogous. But the conclusive answer to this objection is, that the proceedings upon this writ in the federal courts are not governed by the laws and regulations of the states on the subject, but by the common law of England as it stood at the time of the adoption of the constitution, subject to such alterations as congress may see fit to prescribe

(*Ex parte* Watkins, 3 Pet. (28 U. S.) 193; *Ex parte* Randolph, (Case No. 11559); that, according to that system of laws, so guarded is it in favor of the liberty of the subject that the decision of one court or magistrate, upon the return of the writ, refusing to discharge the prisoner, is no bar to the issuing of a second or a third or more writs, by any other court or magistrate having jurisdiction of the cause; and that such court or magistrate may remand or discharge the prisoner in the exercise of an independent judgment upon the same matters (*Ex parte* Partington, 13 Mees. & W. 679; Canadian Prisoners' Case, 5 Mees. & W. 32, 47; The King v. Suddis, 1 East 306, 314; Burdett v. Abbott, 14 East 91; Leonard Watson's case, 9 A. & E. 731). In one of the cases referred to the prisoner had obtained this writ from two of the highest common law courts of England, and also from the Chief Justice of the King's Bench, at chambers, in succession, and their judgments had been given upon the cause of his imprisonment; and the learned judge in delivering his opinion upon the last application, alluding to the decisions upon the former writs, refusing to discharge, observed, that this was no objection to the hearing on that occasion, as a subject in confinement had a right to call upon every court or magistrate in the kingdom, having jurisdiction of the matter, to inquire into the cause of his being restrained of his liberty. The decision, therefore, of the circuit court, upon a previous writ of *habeas corpus* obtained on behalf of the prisoner, refusing to discharge him, will not relieve me from inquiring into the legality of the imprisonment, under the order of the commissioner, upon the present application.

The learned counsel also asked permission to argue the questions arising upon the construction of the treaty and of the act of congress passed in pursuance thereof, and upon the jurisdiction of the commissioner and the competency of the evidence before him upon which the prisoner was found guilty, inasmuch as those questions had not been argued before the supreme court on the side of the British government, as no counsel appeared on that argument, in its behalf. The request was readily granted; and it is a matter of gratification to me, that I have had the benefit of the investigations and views of the learned counsel, in aid of the further consideration which I have been called upon to give to the very important and somewhat difficult questions involved in the final determination of the case. For, although, upon the further consideration of these questions, I am obliged to adhere to the opinions originally entertained and which have been stated at large elsewhere, I am the more satisfied with their soundness, finding them unchanged after the able adverse argument submitted at the hearing. The opinions referred to and which were concurred in by two of my learned brethren, the chief justice, and

Mr. Justice Daniel, led to the conclusions: 1. That the judiciary possess no jurisdiction to entertain proceedings, under the treaty for the apprehension and committal of an alleged fugitive, without a previous requisition, made under the authority of Great Britain, upon the president of the United States, and his authority for the purpose; 2. That the United States commissioner, Mr. Bridgham, was not an officer, within the treaty and act of congress, upon whom the power was conferred to hear and determine the question of criminality, upon which determination, the surrender is to be made; 3. That there was no competent evidence before the commissioner, if he possessed the power, to authorize or warrant the finding of the offence charged. As I have already observed the grounds upon which these conclusions were arrived at have been stated at large elsewhere, and I shall not, on the present occasion, repeat them. They are such as would have satisfied my mind, beyond all questions of doubt, had it not been for the different opinions entertained by four of my learned brethren, for whose judgment I entertain a sincere respect. Those opinions, however, not being the opinions of a majority of the court, and there having been a dismissal of the cause without any decision upon the merits, I am left to follow out my own convictions and conclusions, in the final disposition to be made of it; and, being satisfied of the soundness of them, I must enforce them, until I am authoritatively instructed otherwise.

The practice of delivering up offenders charged with felony and other high crimes, who have fled from the country in which the crime has been committed into a foreign country and friendly jurisdiction, is highly commendable, and sanctioned by the usages of international law. At the same time, it is a delicate power of government, which should be limited, and guarded with great care, to prevent abuses, and be exercised with the utmost deliberation and caution. The difficulty of entering into treaties for this purpose arises out of the character of the criminal codes of different nations, both as it respects the acts made penal by law, and the degree and mode of punishment made and annexed to offenses. An enlightened nation, with a criminal code, ameliorated by the advance of civilization, would not enter into a treaty with a barbarous one, whose code was bloody and cruel. And, even among enlightened nations, the stipulations for surrender are cautiously limited to a few specified crimes of atrocious character, against persons and property. The treaty of Nov. 19, 1794 (8 Stat. 116, 129) between this country and Great Britain, was confined to the crimes of murder and forgery. The present one of 1842 is more comprehensive, though still restricted, as is also the treaty with France, of Nov. 9, 1843, (8 Stat. 580, 582). Mr. Jefferson in 1793, in a letter in reply to a demand by the French

Minister, for the surrender of fugitives, observed:—"The evil of protecting malefactors of every dye is as sensibly felt here as in other countries but until a reformation of the criminal codes of most nations, to deliver fugitives from them would be to become their accomplices."

Another objection to entering into these treaties is the difficulty of guarding against the abuse arising out of demands for the surrender of political offenders, under the form of some of the crimes enumerated in the treaty. In most instances, perhaps, of political offences, the acts, detached from the political character of the transaction, would bring the case within some of the offences enumerated; and, unless the government upon whom the demand is made takes the responsibility of distinguishing between the two, the treaty obligation would require the surrender. The surrender, in such cases, involves a political question, which must be decided by the political, and not the judicial, powers of the government. It is a general principle as it respects political questions concerning foreign governments, that the judiciary follows the determination of the political power, which has charge of its foreign relations, and, is therefore presumed to best understand what is fit and proper for the interest and honor of the country. They are questions unfit for the arbitrament of the judiciary—especially so for the subordinate magistrates of the country. These questions growing out of political offences, greatly embarrass governments in canvassing the policy and expediency of entering into treaties of extradition, and, when they arise, are calculated to endanger the authority and force of such treaties. It was the apprehension of the people, of this country, at the time, that the offence of Jonathan Robbins, who was delivered up under the treaty with Great Britain of 1794, was a political offense, which prevented a renewal of the stipulations from that time down to the present treaty of 1842, as it was claimed that he was an American citizen, and had been impressed on board of a British vessel, and that the crime was committed in rescuing himself from the hands of his oppressors. Assuming such apprehension to have been well founded, the intense public indignation that followed was creditable to the situation.

These considerations, thus briefly stated, (for I have not the time to enlarge upon them), show that the treaties of extradition involve, in the execution of them, great national questions, which should be referred, in the first instance, to the political power of the nation, and which under our system of government, belong to the executive as the head of the nation, to decide. The instances of political offenses, in which demands may be made by one nation upon another, for a surrender of the offender, are by no means imaginary, or cases of no practical application. The history of the times informs us that, at this day, more than one government

of the continent of Europe is agitated with apprehension and alarm upon this subject, and from which even the government of England seems not to have been entirely free. And, in our country, how many political offenders, who have sought an asylum, here from the disastrous struggles for liberty in the other hemisphere, might be pointed out, some of whom even might be the subject of a requisition under the very treaty in question.

These are some of the considerations that strongly urge the interpretation of the treaty before us for which I have heretofore contended, and the result of which has been already stated, and which is the one given to it by Great Britain, in providing for its execution on her part. The demand by this government for the surrender of the fugitive, must be first made directly upon that government, and its consent and authority be obtained, before the judiciary can be called into requisition. In my judgment, this is a sound construction of the language of the treaty; and carries out the intention and policy of the high contracting parties. The case immediately before me may be one of comparative unimportance, as the fugitive demanded is an obscure and humble individual, and may even be the subject of proper surrender under the treaty. But I cannot forget that the principles and rules of construction to be applied to him will be equally applicable to the case of a demand for the surrender of a political offender and to all other cases falling within its provisions. I am, therefore, not at liberty to distinguish it, whatever may be the supposed merit of the application. I think the requisition should have been made, in the first instance, upon the executive, and his authority obtained, in order to warrant the interposition of the judiciary; and further, that the commissioner before whom the application was made, possessed no jurisdiction of the case, not being an officer within the treaty or act of congress passed in pursuance thereof; and that the evidence in the case, upon which the offence was found, was incompetent and hence did not warrant the finding of the magistrate. The proof in all cases under a treaty of extradition, should be, not only competent, but full and satisfactory, that the offence has been committed by the fugitive in the foreign jurisdiction—sufficiently so to warrant a conviction, in the judgment of the magistrate, of the offence with which he is charged, if sitting upon the final trial and hearing of the case. No magistrate should order a surrender short of such proof.

The result is, that the prisoner is entitled to be discharged from imprisonment under the warrant or order of the commissioner, and, consequently from arrest or confinement under the warrant issued by the acting secretary of state in pursuance thereof. But, as the discharge is in consequence of illegality in the proceedings under the treaty, and as the question of surrender is one

of which I can entertain jurisdiction. I am ready to hear any further evidence on behalf of the application, which the representative of the British government may see fit to present.

The counsel for the British government not being prepared to furnish proof that any authority had been given by the president of the United States for the arrest of the prisoner, he was discharged.

Although the usual method of instituting international extradition proceedings is to make first a formal requisition upon the president, upon whose mandate the arrest is made, it has been held that such procedure is not absolutely necessary, but that proceedings may be instituted directly before our courts by the demanding state. But the president may refuse to deliver up the accused even after the warrant has been issued by the court. Nor is the president's warrant of extradition final, since the courts may on *habeas corpus* discharge the accused in that the crime charged does not legally come within the terms of the treaty or for other defects.

IN RE ADUTT.

1893. U. S. CIRCUIT COURT, N. D. ILLINOIS. 55 Fed. 376.

JENKINS, Circuit Judge.—The petitioner, upon complaint of the consul, at Chicago, of the Austria-Hungary Government, was, by the United States commissioner, committed to the custody of the marshal to await the action of the executive upon demand of the Austria-Hungary government for his extradition, upon the charge of forgery. He thereupon sued out his writ of *habeas corpus* to obtain his discharge, and a writ of *certiorari* to the commissioner to bring up the proceedings before him.

Many objections were raised by the petitioner, at the hearing, to the jurisdiction of the commissioner, and to the regularity of the proceedings before him, but I deem it necessary to consider only the following:—First that there is no evidence in the record of any demand or requisition made by the government of Austria-Hungary upon the government of the United States of America for the extradition of the prisoner; second, that the treaty with that government covers only the crime of forgery, and not the offense of uttering forged paper; third, that the crime of forgery as known to the law of Austria-Hungary, comprehends only the falsification of public obligations, and not the forging of commercial paper; fourth, that the offense with which he is charged at Vienna is “fraud by means of forgery;” fifth, that the complaint to the commissioner does not state that Mr. Claussenius, the Austria-Hungary consul, in preferring the complaint, acted in the capacity of the representative of his government; sixth, that the

complaint is defective and void as to jurisdiction, in that it does not set forth the particulars of the commercial paper alleged to be forged.

The office of the writ of *habeas corpus* is not to correct irregularities; is not to reverse the decision of the commissioner because of some incompetent evidence, being admitted; is not to review his decision upon the weight and sufficiency of the testimony. The court can only inquire as to the jurisdiction of the commissioner over the subject matter, and where there was legal evidence before him, supporting the judgment.

The first objection presents a question which has vexed the courts and executive department of the government for many years. I need not here enter into a recital of the conflicting decisions upon this point, except to say that it would seem to have been decided against the petitioner in *In re Kaine*, 14 How. 103, and in *Benson v. McMahon*, 127 U. S. 457, 8 Sup. Ct. Rep. 1240. It would, I think, in the protection of individual liberty, be more seemly to require that the initiative of proceedings for extradition should rest with the government of the United States, upon demand of a foreign government, than that they should be allowed to be instituted by a counsel of a foreign government, without authorization by our government, and would also, I think, better comport with the dignity of the government, and of judicial proceedings; but I feel concluded by the decisions to which I have referred, and am unable, therefore, to sustain this objection.

The second objection—that the crime of uttering forged paper is not comprehended in the term “forgery,”—is, I think, not maintainable. The common law definition of forgery does include the utterance of forged paper.

The third objection—that the crime of forgery as known to the law of Austria-Hungary comprehends only the falsification of public obligations, and not the forging of commercial paper—is, I think, not maintainable. The term “forgery” as used in the treaty, should have, so far as this government is concerned, its common law definition, as it was undoubtedly used in that sense. The law of the Austria-Hungary government, as expounded by Mr. Ziesler, does not indicate that forgery includes only the falsification of public documents. There is designated in its law the crime of falsification of public documents, and there would also seem to be the crime of falsification of private documents, treated in the criminal code of that country as one of the species of crime classified under the general head of “*betrug*” or “*fraud*.” It is under that head defined to be a crime to manufacture false private documents, or falsify genuine ones. We must look to the essence of the offence, and not to its mere denomination in foreign codes, to ascertain just the offense comprehended in the treaty. And the

spirit of that treaty is, as I conceive, that one should be extradited for the commission of the offense, known as forgery, by whatever name it may be called, in the criminal code of Austria-Hungary; and if the charge before the commissioner is that of forgery, as known to our law, and the evidence is sufficient to hold the prisoner for the action of the executive, it is I think, quite immaterial, that the offense of forgery, as known to our law, is classified in Austria under the title of "Fraud by Means of Forgery."

I am unable to sustain the fourth objection. The complaint states that the complainant is the duly accredited official agent and representative of the Austria-Hungary government, at Chicago. The criticism upon the *jurat* to the complaint, that he does not positively swear that he is the consul, but that his title is merely *descriptio personae*, is ill sustained in view of the positive statement in the body of the complaint; and the description of his person in the *jurat* is unnecessary, and superfluous. It is doubtful also, if it be essential that the complaint, should show that it was preferred by the representative of a foreign government. It is enough, probably, if to the commissioner, or to the executive acting upon the proceedings before the commissioner, it duly appears that the proceeding is in fact instituted and conducted by the demanding nation, or its duly accredited representative. It would, I think, be the better practice that the initiative of the proceeding should show that it was instituted by the demanding government; but it seems to have been considered unnecessary, so long as it does appear in the proceedings, as a matter of fact, that they are sanctioned by the demanding government. *Benson v. McMahon*, *supra*.

The fifth objection—that the complaint is defective as to jurisdiction—cannot, I think, be sustained. It is, of course, necessary that the substance of the offense charged, should be declared so that the court can see that the particular crime charged is one enumerated in the treaty; but a complaint need not have the precision and particularity of an indictment, but should set forth the substantial and material features of the offense. *In re Henrich*, 5 Blatchf. 414; *In re McDonnell*, 11 Blatchf. 79. In the latter case the complaint charged that the prisoner did "commit the crime of forgery and the utterance of forged paper, to wit, did feloniously, in the said city, and at the time aforesaid, forge and utter, well knowing the same to be forged, several acceptances of two several bills of exchange, each for the payment of one thousand pounds sterling, lawful money of the Kingdom of Great Britain and Ireland." The court held that this complaint did charge the crime of forgery at common law, although without the particularity required in the formal indictment for the offence. The complaint here, while I think it greatly wanting in par-

ticularity of description, does charge the crime of foreign certain bills of exchange, of the value of 81,000 gulden, Austrian coin. I am inclined to hold this complaint sufficient to give the commissioner jurisdiction, because it charges the crime of forgery. In all such cases as these, however, the commissioner, upon objection of the petitioner, should require an amendment of the complaint, that the petitioner may be fully informed of the particular charge for which he is sought to be extradited, and all the particulars of that charge. He ought not to be required to defend himself against the charge of forging certain bills of exchange without being advised by the complaint of all the particulars of the bills which he is charged with forging. That is, however, a matter for the commissioner, acting within his jurisdiction, and not a matter going to the jurisdiction of the commissioner to entertain the complaint.

There was a further objection made, that the warrant under which the prisoner was arraigned charges two offenses—the forging and the uttering of the forged paper. It need only be said, as to that, that both are comprehended within the crime of forgery, at common law.

I desire to add, in conclusion, that I have been greatly impressed with the dissenting opinion of Mr. Justice Nelson, concurred in by Chief Justice Taney and Justice Daniel, *In re Kaine*, 14 How. 103, and should be glad to see the principles there asserted adopted in all extradition proceedings. The danger to individual liberty by the institution of these proceedings, except under the sanction of the executive of the United States, is too grave to be tolerated. Proceedings in interstate rendition can only be set in motion by the executive of one state on demand of the executive of another. So should it be with respect to extradition. I should be glad to see the jurisdiction of the commissioner called into action only upon the request of the executive. It is true that extradition can be had finally only upon the action of the executive, but there cannot be too many restrictions to the encroachment upon individual liberty. I should also be glad to see a requirement by law that the complaints in such cases as this should be required to have the particularity with respect to charging the offence that is required in formal indictments. This is important in view of the holding that one can be tried in the demanding country only for the offence for which he was demanded and extradited. I feel bound, however, by the decisions, and practice under them, to hold this proceeding sufficient.

It was urged at the hearing that there was not sufficient legal evidence before the commissioner, to sustain his holding. I have carefully inspected the record and without particularizing the facts, I deem it only necessary to observe that I think there was abundant

legal evidence before the commissioner, upon which he might well find that the offence had been committed by the petitioner.

The prisoner will be remanded to the custody of the marshal, to be held under the commitment of the commissioner, awaiting the order of the President of the United States in the premises, and the writs of *habeas corpus* and *certiorari* are discharged.

EX PARTE KER.

1883. U. S. DISTRICT COURT, N. D. ILLINOIS. 18 Fed. 167.

DRUMMOND, J.—This is an application on the part of Frederick M. Ker, for a writ of *habeas corpus* to issue, to inquire into the cause of his imprisonment. and, if it be found unlawful, that he shall be discharged therefrom. The rule upon the subject is that if on the application of this kind the court is of the opinion that the writ, if issued, would not authorize the discharge of the petitioner, it is not necessary to issue it. The law does not require a vain act to be done.

I have come to the conclusion in this case that I will not issue the writ. I will state briefly the reasons why I have reached this conclusion.

The petitioner was charged with the offense of larceny and forgery, committed within the jurisdiction of the court where the two indictments have been found. In considering the question, we may assume, for the purpose of this motion, that these offenses were actually committed. After they were thus committed the petitioner left the country and fled to Peru, in South America, While there he was under the protection of the laws of Peru, and could not be legally removed therefrom except in accordance with the laws of that country.

The United States had made a treaty in 1870, under which Peru agreed, in the manner therein stated, to return to the United States certain offenders who had fled to that country, and claimed the protection of its laws. It has been said in argument that a person cannot be returned who had escaped from justice from the United States, and had taken refuge therein any other way than under the terms of the treaty. That perhaps is true, provided there was no other way under the laws of Peru. I do not know that the fact that a treaty was made between the United States and Peru, by which the latter state agreed to return fugitives from justice to the United States, prevented that country from declaring, under its own laws, that persons might be returned independent of the treaty. All that I wish to insist on is that the

petitioner, being in Peru, could only be legally removed by virtue of the law of that country, and, of course, a treaty made between the United States and Peru is a law of that state. Certain steps were taken on the part of the government of the United States, at the request of the executive of this state, to procure the extradition of the prisoner from Peru to Illinois, where the offenses were committed. Accordingly a requisition was made by the president of the United States upon the authorities of Peru, for the return of Ker.

Owing to some cause, which is not stated in the petition, the steps pointed out in the treaty were not taken. A demand seems not to have been made upon the authorities of Peru; but the petitioner was seized, it may be conceded without any authority on the part of the United States and without any consent on the part of Peru, by private persons; he was placed on board of the United States ship *Essex*, in a port of Peru; transferred to the Sandwich Islands, and thence in a private vessel to San Francisco, within the territory of the United States. For the purpose of placing him under the authority of the law of the United States if he came within the state of California, a requisition from the governor of Illinois upon the governor of California was made, and a warrant issued by the governor of that state. It is said, and it is uncontroverted, that at the time this process was issued by the governor of California, the petitioner was not within the territory and so was not subject to the process or authority of the governor of that state. However this may be, in the same manner it may be admitted that he was taken in Peru, and under the same authority, no more and no less, he was taken to San Francisco, to Illinois, and to the county of Cook, where the offenses were committed. When brought here, there had been a process issued from a competent court, on indictments found in that court against him for the offenses which it was alleged he had committed, and under that process he has been taken into custody; and now, it is claimed, he should be released because of the circumstances connected with his arrest and capture in Peru, and his transfer from that country to the United States. It is claimed that this vitiated—what otherwise would be legal—the arrest under the process by which he is now held in custody.

The question is whether this is so in point of law. It is said that while in Peru he was under the protection of the treaty which had been made between the United States and Peru, and that his seizure and transfer were a violation of the treaty stipulations between the United States and Peru. This is only true in a qualified sense. While in Peru he was not, strictly speaking, under the protection of the laws of the United States, but of the laws of Peru; and if he was taken contrary to the provisions of

the treaty between the two countries, he may have been taken in violation of the laws of Peru. But in one sense it may be said that he does not come within the protection of the treaty between the United States and Peru. That treaty does not guarantee protection to all citizens of the United States who may be within the territory of Peru. It is the laws of Peru that protect the citizens of the United States who may for the time be domiciled in or inhabiting Peru; so that it can hardly be said in the ordinary sense of the language used, that he was under the protection of the treaty between the United States and Peru. True, he could not, it may be, be transferred legally from one state to the other except in the mode pointed out in the treaty, unless there was some law of Peru which authorized it to be done. If the act so done was against the laws of Peru, for that violation the party has his remedy under the laws of Peru, (enforceable here or elsewhere), and not, properly speaking, under the laws of the United States.

The United States by this treaty does not guaranty that it will protect every citizen or inhabitant of Peru who may come to the United States. If a Peruvian here has a trespass committed against him, he has his remedy under our laws. So it is in Peru; when the citizen of the United States is there he is under the protection of its laws. While this, I think, is true, still I am willing to admit that there is force in the view taken by the counsel of the petitioner in this case. Our judgment and our feelings naturally rebel against an act done in the manner in which this was done, as stated in the petition, namely, by a person without authority of law—without any process—seizing one claimed to have fled from justice and taken refuge in Peru, and bringing him to the United States, thus committing what is claimed to be an outrage against personal liberty and personal rights; and we naturally desire, in all proper cases, to give protection to the party who has thus been outraged, and, when he asks for it, to give him adequate compensation for the wrong that has been done. The question is, is that the case? The real question is whether, because of this private wrong done in taking possession of the person of the petitioner to be brought to the state of Illinois, that vitiates the process that has been issued from a competent court for the offence or offences that have been committed or charged against him, so as to prevent his arrest? In view of the authorities which have been cited on the argument, I cannot say that the case is so clear as to authorize the court to issue the writ; or, if it were issued and served, to discharge him from custody on this account. The consequences of the discharge are so very serious that the court may well pause before reaching this conclusion, because the result would be that the petitioner might escape from all trial for these offenses. Once left at liberty, of course

he necessarily would evade trial, unless he remain here until the protection claimed is withdrawn from him, and if he escapes from it, as he had already attempted, because he was once captured, it does not follow that he will a second time.

It seems to me that it is not competent for the court to look into the circumstances under which the capture was made, and the transfer of the petitioner from Peru to the United States, in order to free him from the consequences of the lawful processes which have been served upon him for the offense or offences which he is charged to have actually committed within the county of Cook and state of Illinois.

The only cases which have been cited which seem to have some bearing upon the question involved here, are those which have arisen where a party has been transferred from a foreign country to the United States, and treaties have existed under which the extradition was made from a foreign country to the United States for the commission of a particular offense. Some have held, and such seems to be the opinion of Mr. Spear, who has written a work on the law of extraditions, that where a party has been arrested under the authority of a treaty in a foreign country and transferred to this country for the commission of an offense here, he cannot be tried for a different offense. Perhaps it may be said that the weight of authority is in accordance with that view. But that case is not this. Here, though certain measures were taken by which to transfer the petitioner from Peru to this country, yet they were never carried into effect—the final steps, in other words, were not taken; although the writ of authority was issued, it was not executed as required by its terms, and it may be said that the parties took the law into their own hands, throwing aside the writ of process which had been issued, and which was in the hands of one of them, who thus committed violence upon the petitioner's rights. Here, therefore, the petitioner had not been taken under the authority of law, and in pursuance of the terms of a treaty between the United States and a foreign country, from that country to this. He has been taken, I repeat, simply by what we may call physical force, by those having him in custody. The government has not interfered at all. It has been done under the law of the stronger, and not under statute or common law.

So that this case is not within those decisions, while it may be said to be within the authority of other decisions which were cited on the argument. As I have said, if I were clear in the view that this petitioner should be released, I would issue the writ and discharge him; it is because I am not clear that I decline to issue the writ, the consequence of which would be his discharge; in other words, I am not satisfied that he ought to be dismissed from custody.

I am more inclined to this view because by this decision he does not lose the protection of the treaty if he is entitled to it, for he can set it up in the indictments which have been found against him, and the process which has been issued from the state court; and he can take the opinion of the supreme court of the United States upon the question, if he is entitled to the immunity he claims under the treaty, after the case has passed through the various courts of the state; or he can, I suppose, go to the supreme court of the United States, and apply for a writ of *habeas corpus*, and if he is entitled to it that court can give him the protection of the treaty. So that in deciding the case in this way, I do not deprive him ultimately of any remedy which he has under the treaty between Peru and the United States; and I may add that, in view of the conflict, between some of the state courts and some of the inferior courts of the United States upon this subject, it is very desirable that this question, confessedly of the greatest importance, and now occasionally arising, should be decided by the supreme court of the United States. So that not being satisfied that the petitioner is now entitled to be discharged from the writs which have been issued against him, I shall not direct the writ of *habeas corpus* to issue, for, if issued and served upon him, I should not, as at present advised, release him from custody.

See in general on the jurisdiction of the courts in *habeas corpus* proceedings where international extradition is sought. Brown, *Ex parte*, 28 Fed. 653; Adriance v. Lagrave, 59 N. Y. 110; Stupp, *In re*, 12 Blatch. (U. S.) 501; Fowler, *In re*, 4 Fed. 303; Van Aernam, *Ex parte*, 3 Blatch. (U. S.) 160; Luis Oetiza, *In re*, 136 U. S. 330; Benson v. McMahon, 127 U. S. 457; Fong Yue Ting v. United States, 149 U. S. 698; Ornelas v. Ruiz, 161 U. S. 502; Farez, *In re*, 7 Blatch. (U. S.) 345; Ezeta, *In re*, 62 Fed. 972; Thomas, *In re*, 12 Blatch. (U. S.) 370; McDonnell, *In re*, 11 Blatch. (U. S.) 170; Grin v. Shine, 187 U. S. 181; Stewart v. United States, 119 Fed. 89.

b.—Interstate "Rendition."

EX PARTE ALABAMA, IN RE MOHR.

1883. SUPREME COURT OF ALABAMA. 73 Ala. 503.

SOMERVILLE, J.—The purpose of the present application is to vacate the action of the probate judge, discharging one Alexander Mohr, from alleged illegal custody, on his petition for the writ of *habeas corpus*. The return of the writ showed that the petitioner was held in the custody of the relator, Frederick Gentner, as agent of the state of Pennsylvania, under a warrant of arrest issued by the governor of Alabama, pursuant to a requisition from

the governor of the former state, demanding his extradition as a fugitive from justice. The crime charged is that of obtaining goods by false pretences. The probate judge permitted evidence to be introduced, showing that the prisoner was not in the state of Pennsylvania at the time of the commission of the alleged offense, and had never been there since; that the goods were obtained by purchase from an agent of the prosecutor in the state of New York, to whom the false representations, if any, were made, and that the petitioner had never fled from the state of Pennsylvania, and was not a fugitive from justice. It is claimed that the state courts have no jurisdiction of the case, and if so, that the probate judge had no jurisdiction to go behind the warrant of the executive, to investigate the question as to whether or not the prisoner was in fact a fugitive from justice; and that the proceedings before him were *coram non judice* and void.

The questions thus raised for our consideration involve the construction of a clause in the Federal Constitution relating to the extradition of fugitive criminals between the several states, and of the law of Congress enacted for the purpose of its enforcement.

The Constitution of the United States, provides that "a person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on the demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime."—Art IV, sec. 2.

The act of Congress designed to carry this constitutional provision into effect, was passed in the year 1793, and is found substantially embraced in section 5278 of the revised statutes of the United States (U. S. Comp. Stats. 1901, p. 3597). It provides that "whenever the executive authority of any state or territory demands any person, as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found, or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony or other crime, certified as authentic by the governor, or chief magistrate of the state or territory, from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled, to cause him to be arrested and secured," and to be delivered up to the "agent" of the demanding state or territory. Rev. Stats. U. S. § 5278 (U. S. Comp. Stats. 1901 p. 3597).

The General Assembly has seen fit to enact statutes in this state which are designed to be in aid of this congressional legislation, and impose the duty of extradition upon the governor in all cases falling within the purview of the Federal Constitution.

Code, 1876, §§ 3977-3990. It is needless that we should refer to these in detail.

It is not denied that the great function of the writ of *habeas corpus* is the liberation of those who may be imprisoned without just authority of law. But it is contended that this is a case of which the state courts have no jurisdiction because the petitioner is shown to have been in the custody of one holding him under the authority of the laws of the United States, and who must be regarded as acting *pro hac vice* as an officer or agent of the federal government. The argument seeks to bring this cause within the principle settled in Tarble's case, 13 Wall. 397, (20 L. Ed. 597) decided by the Supreme Court of the United States in 1871, and holding that no judicial officer of a state, has jurisdiction to issue a writ of *habeas corpus* for the discharge of any person "held under the authority, or claim or color of the authority, of the United States, by an officer of that government." The petitioner in that case was an enlisted soldier, in the army of the United States, who sought to be discharged from the custody of a recruiting officer of the Federal Government. The same principle had been virtually settled in Booth's case, 21 How. (U. S.) 506 (16 L. Ed. 169) decided in the year 1858, a decision involving the validity of proceedings under the Fugitive Slave Law.

The present case does not, in our judgment, come within the scope of the above principle, or the reason upon which it is based, which is to prevent a conflict of jurisdiction tending to a collision between the state and federal governments. Tarble's case, *supra*; *Ex parte Le Bur*, 49 Cal. 159; Code 1876, 4936. The relator, Gentner, in whose custody the petitioner was shown to be, was not an officer or agent of the federal government. He was the agent of the state of Pennsylvania whose executive had empowered him to make this demand upon the executive authority of this state. It is no answer that the authority is exercised in obedience to the provisions of an act of congress, passed for the enforcement of the extradition clause of the federal constitution. This provision is well said to be in the nature of "a treaty stipulation between the states of the Union," as binding upon the states as though it was a part of the constitution of each state. *Hibler v. State*, 43 Tex. 197. But in *Kentucky v. Denison*, 24 How. 66 (16 L. Ed. 717), it was said that *if the governor of a state declined to surrender a fugitive criminal on the requisition of the governor of a sister state, the federal government had no constitutional power to use any coercive means to compel him.*" It was further asserted that this duty was "merely ministerial"—"that is to cause the party to be arrested and delivered to the agent or authority of the state where the crime was committed." In *Taylor v. Tainter*, 16 Wall. 366, (21 L. Ed. 287), the duty to deliver or surrender was

pronounced to be one "not absolute and unqualified" but dependent upon "the circumstances of the case." As there said "in such cases the governor acts in his official capacity and represents the sovereignty of the state." Possibly this executive duty may be regarded as *quasi-judicial* in some of its aspects, but this, in our view is not necessarily material in its bearing upon the question before us. The state has seen fit to legislate in aid of this congressional legislation, rendering perhaps, the duty of the governor one of more perfect obligation, if possible. Code § 3977-78. And while it was said by Mr. Justice Story in *Prigg v. Commonwealth of Pennsylvania*, 16 Pet. 539, (10 L. Ed. 1060), that such state legislation was prohibited by implication, as to matters in reference to which congress has already legislated, it seems now to be the better opinion that, where state laws on this subject are not repugnant, but auxiliary to those passed by congress, they may be upheld upon the principle of the right to exercise the power of the domestic police. Bish. Cr. Proc. § 223; Spear on Extradition, 267; Hurd. on Hab. Cor. 633-636; *Work v. Carrington*, (34 O. St. 64), 32 Am. Rep. 345. Congress has not designated the practice or mode of procedure by which the fugitive is to be arrested and secured, and as to this there can be no valid objection to state legislation. It is merely providing "adequate means and facilities for the accomplishment of such extradition."—*Ex parte Ammons*, 34 O. St. 518; *Coffman v. Keightley*, 24 Ind. 509; However this may be, we are of the opinion that Gentner was not the agent of the general government in any proper or legal sense, but of the executive authority of the state which made the demand for Mohr's extradition. *Ex parte Gist*, 26 Ala. 156, 164. It has long been the general if not universal practice of the state courts to exercise jurisdiction in such cases, by issuing writs of *habeas corpus*, in order to test the legality of the imprisonment. This jurisdiction is expressly recognized by section 4957 of the code, and may now be considered as fully established, upon unassailable grounds, throughout the various states. This court does not aspire to the ambition of being the first, and perhaps the only one of the state tribunals of last resort, to assail or deny a jurisdiction which is not only just to the constitutional sovereignty of the states, but favorable to the preservation of the citizen's liberty and which is, at the same time, otherwise so salutary in its juridical influences, as well as honorable in its antiquity.—Spear's law of Extraor. 297-306; Cooley's Const. Lim. (5th ed.) 16, note 1; Hurd on Hab. Cor. 621-632; Rorer on Interstate Law, 223; Whar. Cr. Pl. & Pr. (8th ed.) § 35; Code of Alabama, 1876, § 4936; *Com. v. Hall*, 9 Gray, 262, (69 Am. Dec. 285); *Ex parte Thornton*, 9 Tex. 635.

We encounter more difficulty in the solution of the other ques-

tions presented. Is it permissible to show that the case is one not coming within the provisions of the constitution and act of Congress, because the party charged is not a fugitive from justice, having committed the alleged offence, if at all, only constructively while outside of the territorial jurisdiction of the demanding state? Or are the papers in the case in connection with the warrant of arrest issued by the governor of this state, to be regarded as importing absolute verity in this particular, so as to be incapable of contradiction?

The statute provides that if the return to the writ of *habeas corpus* shows that the petitioner is "in custody for any public offense committed in any other state or territory, for which by the constitution and laws of the United States, he should be delivered up to the authority of such state or territory," he should be remanded.—Code of 1876, § 4957. This is, perhaps, merely declaratory of what the law would require in the absence of the statute. The power claimed by the prisoner is the right to show that his case is one outside of the class intended to be covered by the constitution and laws of the United States.

The authorities are not in harmony as to what questions may be reviewed by *habeas corpus* in cases of extradition. It seems very certain that there is no power to go behind the indictment or affidavit, with the view of investigating the prisoner's guilt or innocence.—*In re Clark*, 9 Wend. 212. He cannot be put upon trial for the crime with which he is charged, nor can any inquiry be made into the merits of his defence, or mere formal defects in the charge. These inquiries are reserved for the courts of the demanding state, having jurisdiction of the offence. *People v. Brady*, 56 N. Y. 182; *Robinson v. Flanders*, 29 Ind. 10. Congress has seen fit to adopt special legislation regulating this phase of the evidence in the case. The act of 1793 makes conclusive the production of a copy of the indictment found or an affidavit made before the magistrate of the demanding state, "charging the person demanded with having committed treason, felony, or other crime," certified as authentic by the governor of such state.—U. S. Rev. Stats. § 5278 (U. S. Comp. Stat. 1901, p. 3597.) These papers, if in due form, are made conclusive evidence of the guilt of the accused, when assailed on *habeas corpus*. It may be considered, therefore, as the settled doctrine of the courts, that a *prima facie* case is made, when the return to the writ of *habeas corpus* shows:—(1) A demand or requisition for the prisoner made by the executive of another state, from which he is alleged to have fled; (2) a copy of the indictment found, or affidavit made before a magistrate, charging the alleged fugitive with the commission of the crime, certified as authentic by the executive of the state making the demand; (3) the warrant of the governor authorizing the

arrest. Where these facts are made to appear by papers regular on their face, there is a weight of authority holding that the prisoner is *prima facie* under legal restraint.—Spear's Law of Extr. 208-303; State v. Schlem, 4 Harr. (Del.) 477; Matter of Clark, 9 Wend. 212; *In re Hooper*, 52 Wis. 699, 58 N. W. 741; People v. Brady, 56 N. Y. 182; Bump's Notes on Const. Dec. 295-297; Johnston v. Riley, 13 Ga. 97.

Many of the cases hold that the warrant of the governor reciting these jurisdictional facts, is *prima facie* sufficient to show that all these necessary prerequisites have been complied with prior to its issue by him, although as to this proposition there is a conflict of opinion. Davis' case, 122 Mass. 324; Kingsbury's case, 106 Mass. 223; Robinson v. Flanders, 29 Ind. 10; Hartman v. Aveline, 63 Ind. 344 (30 Am. Rep. 217.) Which of these is the correct view we need not decide, as all the proper papers in due form are set out in the return made to the writ by the respondent, Gentner, who is the relator in this proceeding.

It is obvious that the extradition clause of the federal constitution has reference only to a specified class, and not to all criminals. Its language is, a person charged with any crime "who shall flee from justice and be found in another state." Art. iv. sec. 2. The act of congress is more emphatic, if possible, in describing such person as an actual fugitive, characterizing him as one "who has fled" and the state in which he is found as the one to which he "has fled." U. S. Revised Statutes § 5278 (U. S. Comp. Stats. p. 3597.) It may be considered clear, therefore, without any conflict of authority, that the constitution and laws of congress do not provide for the extradition of any persons except those who may have fled from or left the demanding state as fugitives from the justice of that state. Whart. Cr. Pl. & Pr. (8th ed.) 31, and cases cited; Spear's Law of Extrad. 273-310-316. "The offence" says Mr. Cooley, "must have been actually committed within the state making the demand and the accused must have fled therefrom." Cooley's Const. Lim. (5th ed.—16 note 1.

There is a difference of opinion as to what must be the exact nature of this flight on the part of the criminal, but the better view, perhaps, is that any person, is a fugitive within the purview of the constitution, "who goes into a state, commits a crime, and then returns home." Kingsbury's case, 106 Mass. 223; Hurd on *Habeas Corpus* 606. In the case of Voorhees, 32 N. J. L. 141, he was characterized as one "who commits a crime in a state and withdraws himself from such jurisdiction." This point, however, we need not decide, as it is shown that the prisoner, Mohr, has never been into the jurisdiction of the demanding state since the commission of the alleged crime. He cannot, therefore, be said to be a fugitive from the justice of that state.

It is clear to our mind that crimes which are not actually but which are only constructively committed within the jurisdiction of the demanding state, do not fall within the class of cases intended to be embraced by the constitution or act of congress. Such at least is the rule, unless the criminal afterwards goes into such state, and departs from it, thus subjecting himself to the sovereignty of its jurisdiction. The reason is, not that the jurisdiction to try the crime is lacking, but that no one can in any sense be alleged to have "fled" from a state, into the domain of whose territorial jurisdiction he has never been corporally present since the commission of the crime. And only this class of persons are embraced within either the letter or the spirit of the constitution, the purpose of which is to make the extradition of fugitive criminals a matter of duty, instead of mere comity between the states. The language of the constitution and the law of congress are entirely free from ambiguity on this point, being too obvious to admit of judicial construction; and the authorities are uniform in adoption of this view as to its manifest meaning.—Whart. Cr. Pl. & Pr. (8th ed.) § 31; Spear's Law of Extrad. 309-316; Voorhees' case, 32 N. J. L. 147; Kingsbury's case, 106 Mass. 223; *Ex parte Smith*, 3 McLean (U. S.) 121; (Fed. Cas. No. 12,968); *Wilcox v. Nolze*, 34 O. St. 520.

We are of the opinion that it was never intended by congress in their enactment of the law of 1793, that the finding of the governor of a state, that one is a fugitive from justice, should be conclusive of the fact, incapable of contradiction by facts showing the contrary. It is an important feature of the law, throwing some light upon its proper construction, that while it expressly prescribes the mode by which evidence of the crime charged shall be authenticated, it nowhere prescribes how the fact that he is a fugitive from justice shall be established. There seems to us to have been a good and sufficient reason for this distinction. Nothing was more proper than the policy of precluding the fugitive from disputing the certified records from the courts of a sister state, in view of the constitutional requirement, that "full faith and credit" shall be given in each state to "the records and judicial proceedings of every other state." Const. U. S. Art. IV, § 1. But no such reason applies to the implication of the defendant's being a fugitive, because he is found in another state than the one in whose courts the charge is pending. It may be asserted that it was within the power of the governor to ascertain and investigate this fact before he issued the warrant, so as to satisfy himself of the truth. Perhaps this is the correct view, but this duty must, in its very nature be discretionary. In practice, the fact of the criminal's flight is usually shown by affidavit, but this cannot be regarded upon any principle known to us as conclusive,

in the absence of statutory regulation so declaring the law. The better view seems to us to be, that one of the purposes of premitting express congressional legislation on this point was to refer the matter to executive determination, subject to review by *habeas corpus* in the courts in all proper cases. The papers being regular, the governor has the right to suppose that a *prima facie* case exists for the warrant, and the safer practice would seem to be, that the accused should be remitted to the courts to establish matters of defense *aliunde* the record. Especially is this true in doubtful cases.

As we have said, the grounds of imprisonment in this class of cases are constantly reviewed by the *habeas corpus* in the state courts. Whar. Cr. Pl. & Pr. § 35. It is just as material to show that the prisoner does not come within the law, on the ground that he has never fled from the demanding state, as on the ground that he is not the identical person intended to be indicted, or that there is no authenticated copy of the indictment, or other charge against him. All these facts must concur, before the law authorizes the requisition to be made, or the warrant of arrest to issue. They are jurisdictional facts, in the absence of which the prisoner is excluded from the operation and influence of the law, and no extradition can be constitutionally authorized by congressional legislation.—Whar. Cr. Pl. & Pr. (8th ed.) §§ 31-34-35.

This view is supported by the best considered cases, and parol evidence has been often admitted by the courts, in proceedings by *habeas corpus*, for the purpose of showing that the warrant of the governor was improvidently issued under the mistaken belief that the prisoner was a fugitive.

The case of Wilcox v. Nolze, 34 O. St. 520, decided in the year 1878, was a case of this kind: The prisoner had been indicted in the courts of New York for obtaining goods by false pretences. The governor of that state sent a requisition to the governor of Ohio, demanding the prisoner's extradition as a fugitive from justice, under the act of congress providing for such cases, the papers all being regular in form. The prisoner was allowed, upon *habeas corpus*, to review the governor's finding, that he was a fugitive from justice. Parol evidence was admitted to show that the crime had been only constructively committed, and that he had never been in the demanding state, and could not, therefore have fled from it. The court said:—"Whether or not the accused committed the acts complained of while actually present in the demanding state, is jurisdictional; and it is clearly competent in such a case, to show by parol evidence a defect in the executive power, however regular the extradition papers may be in the matter of form."

In Hartman v. Aveline, 63 Ind. 344 (30 Am. Rep. 217) the ac-

cused had been arrested under a warrant issued by the governor of Indiana, on a requisition from the governor of the state of Illinois, charging him with the crime of obtaining goods by false pretenses in the latter state, to the custody of whose agent he had been delivered on demand. Upon the writ of *habeas corpus* being sued out, it was shown that the accused was not in the state of Illinois at the time of the commission of the offense, but in the state of Indiana, where he resided, and that he had not fled from the former state. It was objected that the state courts had no jurisdiction to go behind the warrant of arrest issued by the governor, but the court held that there was nothing in the constitution of the United States or the laws of Congress which precluded the inquiry. It was said that the mere recitals in an executive requisition, in the absence of an affidavit, showing an actual fleeing from justice, did not authorize the issue of the warrant.

The same view was taken by the supreme court of Iowa, in *Jones v. Leonard*, 50 Ia. 106, s. c. 32 Am. Rep. 116, a comparatively recent adjudication. A statute of that state provided that requisitions for fugitive criminals should be "accompanied by sworn evidence that the party charged is a fugitive from justice." The evidence accompanying the requisition consisted of an affidavit, charging that the plaintiffs "were fugitives from justice" which the governor determined to be sufficient. It was held that the prisoners, after arrest, could review the conclusion reached by the governor, and show that they were not fugitives from the state of Massachusetts, because the crime charged, which was obtaining goods by false pretenses, had been constructively committed by statements made in a letter, written from the state of Iowa, the state of their domicil. The court decided that the extradition law of congress did not apply to cases of constructive crime like that under consideration, and that it was competent for the state courts, to review the conclusion of the governor. It was said by the court:—"If the decision of the governor is final and conclusive as to this question it must be so as to all questions touching the extradition of a citizen under the constitutional provision above quoted." And again: The governor of this state is not clothed with judicial powers, and there is no provision of the constitution or laws of the United States, or of this state, which provides that his determination is final and conclusive in the case of the extradition of the citizen." It was accordingly held by the court that the decision of the governor was only *prima facie* correct, and that it was reviewable by the courts, on petition sued out by the prisoner for the writ of *habeas corpus*.

The case of *Hibler v. State*, 43 Tex. 197, is in harmony with the same view. While it was there held that the governor of

Texas *prima facie* had authority to issue his warrant of arrest, where the papers were regular, upon the mere representation in the requisition, that the accused was a "fugitive from justice," it was decided that this was a question of fact, which was disputable by proof to the contrary, showing that "the presumption upon which the governor had acted was unfounded in fact, and that thereby this process was being perverted to his injury."

There are other decisions strongly corroborative of the same view, but which we deem it unnecessary to review. *Ex parte* Joseph Smith, 3 McLean (U. S. C. C.) 121, (Fed. Cas. No. 12968); Manchester's case, 5 Cal. 237; Rorer on Interstate Law, 221-2.

We are cited by counsel to the case of *Ex parte* Swearingen, 13 S. C. 74, as an authority adverse to the foregoing views. The point decided in that case was merely, that the absence of an affidavit, that the petitioner was a fugitive from justice, was not fatal to the requisition; and from this conclusion the chief justice dissented in an opinion replete with the force of sound logic. The reasoning of the majority of the court seemed to be based upon the false idea, that a denial of the fact, that the accused was a fugitive, was in the nature of an *alibi* defense, going to the merits of the indictment.

We are of the opinion that the probate judge did not err in discharging the petitioner, and that it was competent for him to hear oral evidence in order to establish the fact, that the petitioner was not a fugitive from justice.

Any other conclusion than this would establish a doctrine very dangerous to the liberty of the citizen. It would greatly impair the efficacy of the proceeding of *habeas corpus*, which has often been characterized as the great writ of liberty, and may be regarded not less than the right of trial by jury, as one of the chief corner-stones in our judiciary system. It might justly be considered as alarming to announce, that a writ which has so frequently been used for centuries past to prevent the encroachment of kings upon popular liberty, is inadequate for the just purposes for which it has been invoked in this cause.

The application made by the relator must be denied. BRICKELL, C. J., dissenting.

That a fugitive from justice has the right to invoke the powers of either state or federal courts to inquire into the legality of executive proceedings looking to his surrender. *Roberts v. Reilly*, 116 U. S. 80; *Fowler, In re*, 18 Blatch. (U. S.) 430; *Thornton, Ex parte*, 9 Tex. 635.

Sufficiency of indictment but not the guilt or innocence of the accused, a proper subject for investigation on *habeas corpus*. *Roberts, In re*, 24 Fed. 132; *People v. Brady*, 56 N. Y. 182; *Swearingen, Ex parte*, 13 S. Car. 74; *Voorhees, In re*, 32 N. J. L. 141; *Greenough, In re*, 31 Vt. 279.

IN RE ROBERTS.

1885. U. S. DIST. COURT, S. D. GEORGIA, E. D. 24 Fed. 132.

SPEER, J.—The constitution of the United States, art. 4, § 2, provides that a person charged in any state with treason, felony or other crime, who shall flee from justice and be found in another state, shall, on the demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime. This provision of the organic law received the careful consideration of the federal convention. Certain changes were made in phraseology showing the settled purpose of its framers to make it the policy of the union to surrender in one state the fugitives from justice in another. It is a settled rule of interstate comity, and imposes an absolute obligation on each state, in a proper case made before its chief executive officer, to surrender and facilitate the extradition of parties charged with crime in the other states of the union. By the act of congress 1793, (Section 5278 of the Revised Statutes) appropriate legislation for the enforcement of this constitutional provision was had; and this legislation has itself received the lofty sanction afforded by the approval by the supreme court of the United States of its constitutionality and effectiveness to enforce the original compact between the states upon this subject, so important to the punishment of crime and the maintenance of social order. *Prigg v. Com*, 16 Pet. 539. Nor have the several states been tardy in the enactment of auxiliary legislation to accomplish the object for which the national law is framed; and the state of Georgia is direct and explicit in its enactments to this ends. See Code, §§ 54-58.

While the duty of the executive is thus plainly marked out it is also the province of the courts on inquiry, by means of *habeas corpus*, to determine the legality of the detention of the party whose extradition is sought; and since the federal legislation of necessity is invoked to extradite the prisoner, the courts of the United States have jurisdiction to determine the question of the legality of his arrest. Rev. St. 735. The courts of this state have also concurrent jurisdiction of the same question, but the resulting judgments of this jurisdiction are not necessarily decisive, and do not conclude the courts of the United States on this Federal question, though they are entitled to great respect, and are strongly advisory.

In the case before the court, the duly-authenticated copy of the indictment of the defendant and one Walton for the offense of grand larceny, said indictment purporting to have been returned, by the grand jury of the state and county of New York, together with the requisition of the governor of the state of New York, and

the consequent order of the governor of Georgia, is presented as the warrant for the arrest and proposed extradition.

It is objected by the counsel for the relator that the indictment does not show a proper charge of crime. It is urged that the crime set out, towit, grand larceny, is a felony, and that the indictment is against several defendants, and that there are no averments showing the degrees of the guilt, whether as principal in the first or second degree, or as an accessory before or after the fact. This objection in the opinion of the court, would have been dangerous to the validity of the indictment, it being a felony, under the rules of common law. This indictment, however, must be considered in the light of the statutory regulations pertinent thereto in the state of New York, and we find that in that state parties charged with felony are indicted jointly precisely as were misdemeanors at common law. 2 Rev. St. N. Y. § 698.

In New York it appears that this rule applies to the whole range of felonies, and, as a consequence, it follows that principals in the second degree may be indicted and prosecuted as principals in the first. This is the doctrine of the common law, where the punishment is the same. Archb. Crim. Pl. (8th Am. Ed.) 63. The objection, therefore, is not sustained.

It is further objected to the legality of this detention that the indictment does not properly allege the ownership of the bonds alleged to have been stolen, and that the allegations that they were the bonds of the Bethlehem Iron Company, without alleging the corporate character of such company, is a fatal defect. Unquestionably there is authority pointing to this conclusion. After careful and anxious consideration of this question the court feels it to be improper that it should discharge the defendant on this ground, and thinks it in every view safer and the better rule to remit the question of the sufficiency of the indictment to be tried and determined by the courts of the state in which it was found. The settled policy of the government being to facilitate the extradition of fugitives charged with crime, and, in view of the great importance of this policy to the commercial prosperity of the country and the integrity in business transactions between the citizens of the several states, it would be a dangerous precedent, and as well in conflict with eminent authority, to hold that such matters of technical irregularity must deny the extradition.

Certain affidavits are also offered by the relator, the practical effect of which is a denial of the guilt. It is sufficient to say that the court in this proceeding will not consider that question. A proper charge of crime having been presented to the court, it is our undoubted duty to decline to investigate the guilt or innocence of the prisoner. The authorities upon this question are numerous, conclusive and adverse to the contention of the counsel

for the relator. It would be otherwise were the arrest made upon preliminary process, and before indictment. In that event investigation would be had, at least, to disclose if there be a prosecution in good faith, and if there be a probable cause to suspect the guilt of the party accused.

It is further urged, and with great apparent confidence, by the distinguished counsel for the relator, that the facts do not show that the relator is a fugitive from justice. It is the opinion of the court that *one who goes into a state and commits a crime, and then returns home, is as much a fugitive from justice as though he had committed a crime in the state in which he resided and then fled to some other state.*

With the other considerations personal to the relator advanced by counsel, the court can properly have no concern. The law is, inexorable, and the court is but its servant, and must like all others, obey its teachings. The writ is disallowed, and the petition of the relator dismissed.

EX PARTE BROWN.

1886. U. S. DISTRICT COURT, N. D. NEW YORK. . 28 Fed. 653.

COXE, J.—THE petitioner was, in Feb., 1886, indicted in Erie County, Pennsylvania, for perjury alleged to have been committed in that county in May, 1885. In August, 1885, he left his home in Pennsylvania and went to Brantford, in the province of Ontario. On the 24th of July, 1886, he was induced by the false statements of parties employed by those interested in his conviction to come into the state of New York. No force or violence was used, but he was informed and believed that Youngstown, New York, was in the Dominion of Canada. On arriving at Youngstown he was immediately arrested. A requisition for his surrender was made by the governor of Pennsylvania upon the governor of this state, who issued a warrant for his delivery to the agent of the former state. The prisoner thereupon applied for a revocation of the warrant. A rehearing was granted, additional evidence was taken, and a full opportunity accorded counsel for a presentation of their views. After a careful consideration of all the issues involved the governor decided not to revoke the warrant previously issued. The petitioner now asks for a discharge, insisting that he is not a fugitive from justice, his presence here having been obtained by fraud. The sheriff makes return that he holds the petitioner by virtue of the warrant referred to. The case, as presented to the court, is in the same situation as when considered by the governor.

No material fact has been added; no new proposition of law is advanced.

That the court has jurisdiction is beyond all doubt. *In re Doo Woon*, 18 Fed. Rep. 898; *Ex parte Morgan*, 20 Fed. Rep. 298; *Ex parte Smith*, 3 McLean, 121; *Ex parte McKean*, 3 Hughes 23.

It was insisted in *In re Robb*, 19 Fed. Rep. 26, that the federal courts have exclusive jurisdiction in extradition cases; but this view was overruled by the supreme court in *Robb v. Connolly*, 111 U. S. 624, s. c. 4 Sup. Ct. Rep. 544, where it was decided that jurisdiction is concurrent with the courts of the states. The decisions are by no means unanimous as to the power of the court, in these cases, to review upon *habeas corpus*, and overrule the decisions of the executive authority; and the question has not, so far as I have been able to ascertain, been decided by the supreme court.

In *Ex parte Reggel*, 114 U. S. 642, s. c. 5 Sup. Ct. Rep. 1148, the court held that the action of the governor, even though supported by slight evidence, was *prima facie* conclusive, and proof was required to overcome it. In *Roberts v. Reilly*, 116 U. S. 80, 95 s. c. 6 Sup. Ct. Rep. 291, it was held that the determination in the warrant that the party is a fugitive from justice must be regarded as sufficient until the presumption in its favor is overcome by contrary proof. In *Leary's case*, 10 Ben. 197, the warrant of the executive was held conclusive in some particulars, and, after an elaborate examination of the authorities, it was strongly intimated that it would be so held for all purposes whenever a case should be presented rendering such a decision necessary. See, also, *Kentucky v. Dennison*, 24 How. 66; *State v. Buzine*, 4 Har. 572.

Assuming the power of the court to reverse the decision of the governor, there can be little doubt of the impropriety of such a course; especially where it appears that he unquestionably had jurisdiction, and reached a conclusion only upon mature deliberation, and after a hearing had been accorded to all parties interested. The court should be clearly satisfied that an error had been committed before setting aside the solemn act of the high official upon whom the execution of these solemn duties is devolved by law. I have, however, as requested at the argument, examined the questions presented as fully as opportunity will permit, and see no reason to differ from the governor in the conclusion reached by him. It was clearly his duty to grant the extradition when it appeared, that the petitioner was a fugitive from justice, and the demand by the executive authority of Pennsylvania was supported by an indictment, duly authenticated, charging the prisoner with having committed perjury in that state. *Ex parte Reggel, supra.*

No question is raised as to the sufficiency of the indictment,

or of any of the papers upon which the governor acted. It is admitted that the petitioner was in the state of Pennsylvania at the time charged in the indictment; that he was a witness at the trial when the perjury is alleged to have been committed; and that thereafter he removed to Canada, where he remained until he was induced to come into this state.

In *Roberts v. Reilly*, *supra*, the supreme court thus interprets the law:—

“To be a fugitive from justice, in the sense of the act of congress regulating the subject under consideration, it is not necessary that the party charged should have left the state in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun; but simply that having within a state, committed that which by its law constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction, and is found within the territory of another.”

Thus declined there can be no doubt that the prisoner was a fugitive from justice within the meaning of the law.

The question remains was the duty of the executive to deliver up the petitioner at all affected by the fact that he was induced by the trickery and fraud of private persons to come within this jurisdiction? I am entirely clear that it was not. The contention that a party charged with crime is entitled to be released on *habeas corpus*, because by stratagem,—which, though morally reprehensible, is not criminal in a legal sense,—he is induced to come within territory where he may properly be arrested, is not supported by a single authority.

The case of *Hadden v. People*, 25 N. Y. 373, falls far short of sustaining the proposition that the petitioner was brought here by the commission of a crime equivalent to kidnaping. In that case Wallace was overcome and stupefied by drink; his reason was dethroned; he was no longer a free agent. In this condition he was carried aboard a vessel about to depart for a foreign port. Here there was a false statement, but nothing more,—no physical restraint was used, no drugs were administered. The petitioner himself rowed the boat that conveyed him across the river.

The criminal law, administered, as it is, for the protection of the whole people, does not take cognizance of the means by which alleged offenders are apprehended, so long as no act is done which in itself, is an infraction of law. But the whole subject is so carefully considered and reviewed in the opinion filed by the governor, and the reasons for his action are so clearly stated, that further comment is unnecessary.

The writ should be dismissed, and the prisoner remanded.

See also *Robb v. Connolly*, 111 U. S. 624; *Smith, Ex parte*, 3 McLean (U. S.), 121; *Doo Woon, In re*, 18 Fed. 898; *Dawson, Ex parte*, 83 Fed. 306; *Strauss, In re*, 126 Fed. 327; *Roberts v. Reilly*, 116 U. S. 80.

But see *Haddon v. People*, 25 N. Y. 373.

IN RE NOYES.

1878. U. S. DISTRICT COURT, NEW JERSEY. 17 Alb. Law Jr. 407.

PROCEEDINGS by *habeas corpus* to secure the release of the petitioner. The facts appear in the opinion.

NIXON, J.—I am quite clear that the facts presented by the return and testimony in this case preclude the court from discharging the prisoner on these proceedings, whatever may be the opinion of the court in regard to the method of the agents of the state to obtain the body of the petitioner, and I should be sorry to say or do anything which might be construed into disapproval of such methods and proceedings. It nevertheless, appears affirmatively that the prisoner is detained by the legal authority of the state to answer certain alleged violations of the criminal laws in New Jersey. The case falls within the provisions of section 753 of the Revised Statutes of the United States, which restrict the writ of *habeas corpus* to a case, where a prisoner in jail is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process or decree, of a court or judge thereof; or is in custody in violation of the constitution or a law or treaty of the United States. * * * or unless it is necessary to bring the prisoner into court to testify.

It appears in the petition, return and evidence that the prisoner was brought into the state of New Jersey, from the District of Columbia, by persons claiming to act under the constitution and laws of the United States in regard to the extradition of fugitives from justice.

The second section of article IV of the constitution provides that a person charged in any state with treason, felony or any other crime, who shall flee from justice and be found in another state shall, on demand of the executive authority of the state whence he fled, be delivered up to be removed to the state having jurisdiction of the crime.

The act of Congress of Feb. 12, 1793, (§ 5278 of Rev. Stat. of U. S.) was passed to provide the machinery to carry into effect this provision, and it is thereby made the duty of the executive of the state or territory, to which the person charged with crime, generally designated in the constitution, has fled upon lawful demand, to cause the fugitive to be arrested and surrendered up.

The alleged fugitive in the present case being in the District of Columbia, the demand was upon the Chief Justice of the Supreme Court, under section 843 of the Revised Statutes, relating to the District of Columbia, wherein that officer is directed to deliver up fugitives from justice in the same manner as the executive authorities of the several states are required to do, under the extradition act.

The demand of Governor McClellan upon Chief Justice Carter was dated March 11, 1878, and was based upon the allegation that the prisoner stood charged with the crime of perjury, committed in the county of Essex, state of New Jersey, that he had fled from the justice of said state, and had taken refuge within the District of Columbia.

It is requested that the petitioner be delivered up to Robert Lang, and Andrew J. McManus, who were authorized to receive him and convey him to the state of New Jersey, there to be dealt with according to law.

The grounds alleged in the petition for the discharge of the petitioner were that he was a citizen of Connecticut, residing at New Haven, in said state; and in the latter part of February last he left his home for the purpose of attending to certain business in the city of Washington in relation to the legislation pending before the Congress of the United States, and under consideration by a committee of the senate; that he passed openly in the daytime through the state of New Jersey, took rooms at a hotel in the city of Washington, where he remained from day to day in the open and public pursuit of the business objects for which his presence was required at the capitol, and attended from time to time before the senate committee, and held conferences with different members of congress, concerning business which he had in hand; that he was thus engaged on the 11th day of March last, and in the evening of that day had retired to his bed as usual, when, about midnight, he was awakened and disturbed by the entrance of three men into his room, who informed him that they had authority to arrest him and take him to the state of New Jersey, which they did. * * *

That the indictments which formed the basis of such extradition proceedings do not charge any crime under any statute or at common law, and that, therefore, the arrest in the manner aforesaid was illegal, and a violation of the right of the petitioner as a citizen of the United States.

If the return had been made to the writ of *habeas corpus* in this case, that the warden annexed to the writ, issued for the prisoner on his application to the Supreme Court of the United States to be admitted to bail, towit:—that he was held in custody only by virtue of the commitment issued by the governor to the keeper of the jail of the county of Essex, the sole question presented would be,

whether it was competent for this court to inquire into the sufficiency of the evidence upon which the governor of New Jersey and the Chief Justice of the District of Columbia acted, in making the requisition by the one and the order for the rendition by the other.

But the return, as amended set forth the existence of new facts, which had arisen since the writ was allowed.

It is not only averred that the prisoner had been delivered into his custody by virtue of the writ of commitment issued by Governor McClellan, of New Jersey, but also that he was held (1) by writs of *capias* from the court of oyer and terminer in and for the county of Essex, for the term of April, 1877 and the term of April, 1878; (2) by virtue of orders of said court remanding him to his custody for trial upon the indictments to which he had hitherto pleaded, the tenors of which were annexed, and which were the cause of his detention.

The writ of *habeas corpus* was tested and allowed April 16, 1878. It appears by the copies of the papers annexed to the return that on the 19th day of April the court of oyer and terminer of the county of Essex, caused the prisoner to be placed at the bar to be charged on the indictments for perjury, upon which the requisition had been made, and, on his plea of not guilty, the court had remanded him to the custody of the warden, of the jail for trial upon the eighth of May, upon the indictments to which he had before pleaded; that on the 26th day of April he was again set to the bar of the court, to be charged upon another indictment for conspiracy, and, upon his plea, of not guilty, the court had again remanded him to the same custody and control to be held for trial.

The traverse to the return substantially admits the truth of these allegations, but it seeks to break their force by claiming that if the arrest of the petitioner, by means of which he was brought within the jurisdiction of this state, was unlawful, he is entitled to his discharge from custody, and return to his home, notwithstanding he was charged upon other indictments and has been ordered to be held for trial since the service of the writ of *habeas corpus*.

We are thus brought to the consideration of the naked questions:— (1) Whether a fugitive from justice extradited from one state of the Union to another on the charge of a specific crime being committed, can be held by the courts of the state to which he is sent for trial, for another and different crime? And (2) whether such persons may be detained by the authorities of the state for prosecution notwithstanding it may appear that his arrest under the rendition proceedings was without legal authority?

If these inquiries are answered in the affirmative; if the state court, without regard to the lawfulness or unlawfulness of the

methods adopted to obtain the custody of the body of the prisoner, may detain him for trial upon the same or other indictments charging him with offenses against the criminal laws of the state, he has no claim upon this court, for his discharge on the ground that his rights as a citizen were violated by the parties who secured his person in a foreign jurisdiction other than by due process of law?

Questions were discussed in the argument which may properly arise between governments, as to the construction of the extradition treaties or between individuals, as to the responsibility for the invasion of personal rights, but which, in my judgment, are not involved in the present inquiry.

It may be true that where a treaty exists between two independent nations in regard to the surrender of fugitives, or a criminal is given up on the allegation that he had committed a specific crime, good faith between the governments requires that he should not be tried for other offenses.

It may be true that when a citizen is placed under restraint without lawful cause, he can hold every one who caused or contributed to his imprisonment, to a strict accountability in a civil action. In the one case the right of asylum is sacred, except so far as it has been yielded by the terms of the international compact, and any abuse or perversion by one government, of the privileges of arrest granted by the treaty, is a just cause of complaint on the part of the other.

In the other case, so jealous is the law in regard to the invasion of the individual liberty of the citizen, that all unauthorized restraint of his person is followed by damages against the offending party.

But here a court of competent jurisdiction has the custody of a person, who is charged with the commission of certain offenses against the laws of the state. The answer to the charge is that some other person has done a wrong to the prisoner, by violating the laws of another state, in arresting him without proper authority.

In a criminal case, this can hardly be reckoned a pertinent response. A person arraigned for the commission of a felony cannot plead in bar, that he ought to be excused from answering the charge, because other parties trespassed upon his personal rights.

It is a confounding of matters which are essentially separate and distinct. It is a claim on the part of the accused, that his criminal violations of the law are to be condoned by his personal injuries. It is asking a court to suspend its most responsible duties to-wit:—the trial of offenders against the penal code of the state, while the persons charged with the crime are instituting preliminary investigations into the methods adopted to bring them within its jurisdiction. Such a course, for obvious reasons, is allowable in a

civil suit between private litigants, but, for like obvious reasons, cannot be and never has been allowed in criminal proceedings, where the object of the prosecution is to punish an offender against the public. On a claim of this sort the court says to the prisoner: "You are going too fast. We will consider one thing at a time and everything in its regular order. The precise matter which now concerns you and the court is, whether you are guilty of the crime charged against you. As you happen to be found within our jurisdiction we will first settle that question, and afterwards, if need be, will inquire into the circumstances attending your rendition for trial, or will leave the respective governments to discuss them, or will remit you to the recovery of such damages as you may be able to obtain in the civil courts for the violation of your rights of person."

All the authorities of Great Britain and the United States when carefully considered and interpreted by their circumstances, support this view of the law.

The earliest cases in England to which the attention of the court has been called, are *Rex v. Marks*, 3 East 175, before the King's Bench in 1802, and *Ex parte Kraus*, 1 Barn. & Cres. 238, in the same court in 1823, in both of which it was held that when a party was liable to be detained on a criminal charge, the court would not inquire on *habeas corpus* into the manner in which the capture had been effected.

The case of *Susannah Scott*, 9 Barn. & Cres. 446, before the King's Bench in 1829, was:—A rule *nisi* had been obtained for a *habeas corpus* to bring the body of the prisoner in the custody of the marshal, in order that she might be discharged, on the ground that she had been improperly apprehended in a foreign country.

It appeared on the return that an indictment for perjury had been found against her in London; that a warrant for her arrest to appear and plead had been granted; that the police officer having the warrant went beyond his jurisdiction, and followed her to Brussels and there arrested her, conveyed her to Ostend against her will, and thence back to England. Chief Justice Tenterden on discharging the rule, said:—"The question is this, whether if a person charged with a crime is found in this country, it is the duty of the court to take care that the party shall answer to justice, or whether we have to consider the circumstances under which she was brought here." I thought, and still continue to think, that we cannot inquire into them.

The courts of South Carolina in the same year were considering the same question, as appears in the case of the *State v. Smith*, reported in 1 Bailey 283.

In the case of the *State v. Brewster*, 7 Vt. 118, before the supreme

court of Vermont, in 1835, an attempt had been made in the court below to have the proceedings in the indictment against the defendant dismissed on the ground that he was forcibly and against his will, and without the assent of the authorities of Canada, brought from that province. The court held that the matter set up could not avail the prisoner.

Dow's case reported in 18 Pa. St. 37, is in many of its features quite similar to the one under consideration, but the illegality of the capture could not be set up by the fugitive.

The case of the State v. Ross, 21 Iowa 467, was cited also, and no reference was made to the cases of United States v. Caldwell, 8 Blatchf. C. C. R. 131, because they had been fully discussed in the argument, and were not considered pertinent in the present inquiry.

They all turn upon the construction of the treaty between the United States and Great Britain, in regard to the extradition of fugitives from justice, and involve the authority of the courts to hold a surrendered fugitive for trial for any other than extraditable offenses. It may, however, be remarked, in reference to this question, that the second clause of the VIth article of the Constitution of the United States, treaties are declared to be the supreme law of the land, and by the second section of the third article they are brought as directly within the judicial power as cases in law and equity, arising under the constitution and laws of the United States; unless therefore, there was something in the treaty with Great Britain which required the aid of legislative provisions to give it effect (see 2 Pet. 353), it is somewhat difficult to understand or to indorse the reasoning of the learned judge who decided the case of Caldwell v. Lawrence, and especially where he asserts that complaints of the abuses of the extradition proceedings do not form a proper subject of investigation in the courts of the United States.

It is the conclusion of the court upon principle and authority that the state court has the right to hold the prisoner for trial for the offense charged against him without reference to the circumstances under which his arrest was made in a foreign jurisdiction.

It necessarily follows that there is no authority here to discharge him on the *habeas corpus*. Neither the constitution of the United States nor the 753d section of the Revised Statutes makes any provision for the writ in such a case, and the prisoner must be remanded.

In accord.—State v. Patterson, 116 Mo. 505; Lascelles v. State, 90 Ga. 347, affirmed in Lascelles v. Georgia, 148 U. S. 537; Ham v. State, 4 Tex. App. 645; State v. Stewart, 60 Wis. 587; Harland v. Territory, 3 Strewé (Wash. Ter.), 131.

Contra, Daniel's case, Binn's Jus. (9th ed.) 495; Cannon, Matter of, 47 Mich. 481; LaGrave's Case, 14 Abb. Pr. N. S. (N. Y.) 333, 343; State v. Hall, 40 Kans. 338. See especially McKnight, *Ex parte*, 48 Oh. St. 588, where the court speaking through Williams, C. J., holds that no difference exists in principle between interstate and international extradition.

In affirming the right to try a prisoner on an offense other than that charged in the requisition in cases of interstate rendition and denying such right in cases of international extradition, Prof. Moore, in his masterly work on Extradition, Vol. II, p. 1042, in commenting on the cases of *Kerr v. Illinois*, 119 U. S. 436, and *United States v. Rauscher*, 119 U. S. 407, says: " * * * It was not because the court conceived it to be an intrinsically immoral thing to try the fugitive for an offense other than that for which he was delivered up, that it was held that he could not be so tried; for, after having obtained the surrender of a fugitive in the regular and legal way, the authorities, apprehensive, lest the extradition charge might not be sustained on the trial, might, there being no agreement to the contrary, with the utmost good faith and in response to the most urgent demands of justice, seek to convict the prisoner on another charge. It was because the treaty, the law of the land, was held to forbid such trial, that the court refused to permit it. But, it may be asked, why was it that the court decided that the treaty inhibited the trial, if it did not expressly forbid it? To answer this question is to explain the fundamental difference between extradition and interstate rendition. The decision rested upon the following grounds: The court held that in strict law every independent nation has the right to afford asylum for fugitive offenders and to refuse to deliver them up. This right it must be supposed to maintain except in so far as it sees fit to forego it. This it may do either in the exercise of comity, or by placing itself under the obligation of treaty. But, in whichever way, it may be secured, the particular concession is not held to have the effect of a general abandonment of the right. Hence, if a nation agrees by treaty to extradite fugitives for certain offenses, it abridges its asylum only in respect to those offenses; and, if under its obligation to surrender, it delivers a fugitive up, it deprives him of asylum only as to the offense for which it is shown that his extradition is due, and surrenders him to be tried for that offense and for no other. As to other offenses, he is to be considered as being still within the state from which he was taken, and as being entitled to an opportunity to return to that state before being tried for such an offense. There is also yet another reason for this rule. Whatever views may be entertained as to the right to try for another than the extradition offense, where the treaty is silent on the subject, it is universally admitted that no nation is bound to deliver up fugitives where their offenses, by whatever name they may be called, are shown to be political; and it would be an infraction of international law to obtain the surrender of a fugitive for a common crime and then try him for a political offense. The opportunity which the absence of any restriction even as to common crimes would afford for political prosecutions, has been a persuasive argument in leading the courts to find in the treaties which contain no express limitation on the subject, an implied inhibition of trial for any other than the extradition offense. * * * "

Section 4.—"The Parties."

1. The petitioner.

In the very nature of the writ, the person in custody is under all circumstances the proper party to petition for the writ, unless, of

course, the nature of the restraint to which he is subjected is such as to render it impossible for him to make the application. The benefits of the writ extend not only to citizens but to aliens as well, *i. e.*, alien friends. The above statement is as applicable to custody on civil process as it is to that on criminal process, or no process at all.

TERRITORY OF KANSAS *EX REL.* GOSS *v.* CUTLER.

1860. SUPREME COURT OF THE TERRITORY OF KANSAS. 1 Kan. 565, *supra* p. 708.

THE CASE OF THE HOTTENTOT VENUS.

1810. COURT OF KING'S BENCH. 13 East 195.

A female native of South Africa, remarkable for the formation of her person, was exhibited in London in the course of the autumn of this year under the name of the "Hottentot Venus" (her real name being Saartje Baartman) by certain persons who had the apparent custody of her, and who received money for such exhibition. The decency of the exhibition was not called in question; it appearing that the woman had proper clothing adapted to the occasion; but from some expressions which had been uttered by those who had brought her over to this country, and with whom she continued, and some apparent indications of reluctance on her part during her exhibition, there was reason to believe and affidavits were accordingly laid before the court to that effect, by the secretary of a society denominated the African Institution, that she had been clandestinely inveigled from the Cape of Good Hope, without the knowledge of the British governor (who extends his peculiar protection in nature of a guardian over the Hottentot nation under his government, by reason of their general imbecile state;) and that she was brought to this country and since kept in custody and exhibited here against her consent. Whereupon the court, on the motion of Mr. Attorney General granted the following rule:—

England.—Upon reading the several affidavits of Zachary Maccauley and others, and William Bullock, it is ordered that Tuesday next be given to Alexander Dunlop and Henrick Caesar, to show cause why a writ of *habeas corpus* should not issue directed to them, commanding them to have the body of a certain native of South Africa, denominating the Hottentot Venus, before this court immediately, to undergo, etc. Upon notice of this rule to be given to

them in the meantime. And it is further ordered, that one or two such person or persons as shall be approved for that purpose by the coroner and attorney, of this court shall, at such times as shall be appointed by the coroner and attorney, have free access to the said native of South Africa at the house of the said Alexander Dunlop and Henrick Caesar, in York Street, Piccadilly, in the absence of said Alexander Dunlop and Henrick Caesar, but in the presence of one or two such person or persons as shall be denominated by them, and to be approved of by the said coroner and attorney for the purpose of conversing with her.

Such examination took place accordingly before the coroner and attorney of this court, who made his report thereof; from whence it satisfactorily appeared to the court that the woman came over here and was exhibited, by her own consent, upon a contract to receive a certain proportion of the profits arising from the exhibition of herself; and this being confirmed by affidavits made by those who had the care of her; the court, whose authority as guardian of the personal liberty of the subject was alone called into action on this occasion, finally discharged the rule.

Third person petitioning in the behalf of the prisoner: McCullough, *Ex parte*, 35 Cal. 97; *People v. Willett*, 15 How. Pr. (N. Y.) 210; *Williamson v. Lewis*, 39 Pa. St. 9; *Cobbett v. Hudson*, 15 Q. B. 988; *Parker, In re*, 5 M. & W. 31; *Ross, In re*, 3 P. R. (Can.) 301; *Broomhead v. Chisolm*, 47 Ga. 390; *Commonwealth v. Curby*, 3 Brewst. (Pa.) 610; *Armstrong v. Stone*, 9 Grat. (Va.) 102; *United States v. Williamson*, 28 Fed. Cas. 686; *Carmichael, In re*, 1 U. C. L. J. n. s. 243; *Ferrens, In re*, 3 Ben. (U. S.) 442; *Simmons v. Georgia, etc., Co.*, 117 Ga. 305.

The writ may be granted at the petition of:

Parent for his child: *People v. Mercein*, 3 Hill (N. Y.) 399; *Pearson, In re*, 4 Moore, 366; *Rex v. Lister*, 1 Strange, 478.

Master for his apprentice: *People v. Pillow*, 1 Sandf. (N. Y.) 672; *Commonwealth v. Peck*, 1 Browne (Pa.), 277.

Guardian for his ward: *Hyde v. Jenkins*, 6 La. 435; *Commonwealth v. Hammond*, 27 Mass. 274; *Hovey v. Morris*, 7 Black (Ind.) 559.

Wife for her husband: *Cobbett v. Hudson*, 15 Q. B. 988.

EX PARTE CHILD.

1854. THE COURT OF COMMON PLEAS. 15 Common Bench 237.

BYLES, Serjt., on a former day in this term, obtained a rule calling upon Francis James Lord to show cause why a writ of *habeas corpus* should not issue, to compel him to bring up the body of Captain Child, who was detained in a lunatic asylum in Hayes Park Middlesex, kept by Lord.

The affidavits upon which the motion was founded, were those of one Mead, who described himself as the attorney for Captain Child, and who stated that the only certificates under which Captain Child was detained, were those of two medical practitioners in Dublin; and of Dr. Buchanan and Dr. Barnes, who deposed as to the present state of mind of Captain Child.

The learned Serjeant submitted that an Irish certificate does not justify the detention of a party as a lunatic in this country, —referring to the statute 8 & 9 Vict. c. 100 ss. 45, 46, 47, 117, and to the case of *In re Shuttleworth*, 9 Q. B. 651 (E. C. L. R. Vol. 58.)

Montague Smith, who appeared to show cause, objected that there was no affidavit showing that the application was made with the sanction of Captain Child, or that Mead had any authority to appear and act as his attorney. He referred to *In re Parker*, —the Canadian Prisoner's case, 5 M. & W. 32, where the Court of Exchequer said:—"Before granting a *habeas corpus* to remove a person in custody, we are to ascertain that an affidavit is not reasonably to be expected from him. An affidavit is absolutely necessary, either from the party who claims the writ, or from some other person, so as to satisfy the court that he is so coerced as to be unable to make it.

BYLES, Serjt., admitted that his affidavit did not sufficiently show that the application was authorized by Captain Child.

JERVIS, C. J.—I think my Brother Byles has not put himself in a condition to ask for the writ. A mere stranger has no right to come to the court and ask that a party who makes no affidavit, and who is not suggested to be so coerced as to be incapable of making one, may be brought up by *habeas corpus* to be discharged from restraint. For anything that appears, Captain Child may be very well content, to remain where he is. The rule must be discharged; and, as Mr. Lord has been put to the expense of coming here unnecessarily and fruitlessly, it must be with costs.

The rest of the court concurring, Rule discharged with costs.

Smith asked that the costs of the rule might be ordered to be paid by the attorney.

Sed per curiam. We cannot do that.

COMMONWEALTH v. REDGWAY.

1839. COURT OF COMMON PLEAS OF PHILADELPHIA Co., PA. 2
Ashmead 247.

(So MUCH of the opinion as relates to the question of probable conspiracy, shown by the evidence against the relator is omitted.)

The defendant had been bound over by the mayor of the city of Philadelphia, to answer the charge of a "conspiracy with Dr. Dyott, to defraud the community; and refusing to give bail to the mayor, was committed to the custody of Willis H. Blaney, one of the high constables, and immediately sued out the writ of *habeas corpus*; the testimony on the part of the commonwealth was produced, and the case fully argued on both sides by counsel; and on Saturday, Aug. 3, 1839, the defendant was discharged, the judges giving their opinions *seriatim*.

RANDALL, Justice.—The writ of *habeas corpus* in this case, was directed to Willis H. Blaney, one of the high constables of the city of Philadelphia, who returned, that he had the relator in custody by virtue of a commitment, signed by the mayor, charging him with "a conspiracy, with Thomas W. Dyott, to defraud the community."

A preliminary exception was made by the counsel for the commonwealth, to the regularity or the propriety of the writ in the first instance, which, if well founded, will prevent the necessity of any further examination of the cause, and place the relator in the same situation he was at the time the writ was issued.

It is said that because the defendant was not actually in prison, he being able to give the security required, (his own recognizance only having been demanded by the mayor), his case is not within the letter or the spirit of the *habeas corpus* act. It is admitted that in cases where the committing magistrate has no authority to take bail, a *habeas corpus* may issue to the constable or other officer having the defendant in charge; but, a distinction is endeavored to be drawn between such a case and one in which the magistrate may take bail and the party be able to procure it. I am unable to perceive any such distinction; on the contrary, I think the case within the letter and the spirit of the act.

The object of the *habeas corpus* act was to prevent any wrongful or illegal restraint of personal liberty; and *whenever a person is deprived of the privilege of going when and where he pleases, he is restrained of his liberty and has a right to inquire if that restraint be illegal and wrongful; whether if it be by a jailer, constable or private individual.* It is not necessary that the degradation of being incarcerated in prison, should be undergone, to entitle any citizen who may consider himself unjustly charged with a breach of the laws, to a hearing. The whole spirit of the law is in favor of liberty; and if the words were doubtful, it should be construed liberally in favor of that blessing. But, the case is also within the strict letter of the law. The act declares, "If any person shall be or stand committed or detained for any criminal or supposed criminal matter, unless for treason or felony," &c., he shall (in vacation) apply to a judge, who is required to award and grant a writ of *habeas corpus*, to be "directed to the person,

or persons in whose custody the prisoner is detained;" and the "officer, sheriff, jailer, keeper or other person whatsoever, to whom the same shall be directed," is required to bring the prisoner before the judge who awards the writ. This and some other portions of our *habeas corpus* act, have been copied from the British statutes of '31, sec. 2, ch. 2; under which it has been expressly decided, that a constable is within that provision of it which imposes a penalty for refusing a copy of the commitment. 1 Strange, 136. And, in one of the cases, cited in another part of this examination by the counsel for the commonwealth, on a charge similar to the present (conspiracy), the *habeas corpus* was issued by the chief justice, who made the return. * * *

NICHOLS v. CORNELIUS.

1856. SUPREME COURT OF INDIANA. 7 Ind. 611.

GOOKINS, J.—Pamelia Cornelius, presented a petition to the judge of the common pleas of Decatur county, stating that she was illegally imprisoned by James T. Nichols, under pretense of a warrant from the governor of this state, and praying for a writ of *habeas corpus*, which was granted. Nichols returned to the writ that he held the petitioner in custody by virtue of a writ issued by the governor of this state, upon a requisition of the governor of the state of Kentucky, for the petitioner, as a fugitive from justice, and of an appointment of himself as an agent of the state of Kentucky, to demand and return said fugitive, pursuant to such requisition. The petitioner excepted to the return, the judge sustained the exceptions, and ordered her to be discharged; from which order Nichols appeals to this court. * * *

A further position assumed is, that the appellant is not within the terms of the statute; that he is but a nominal party, being an agent only of the state of Kentucky, which if any one is the real party. Why, then, did not the petitioner make the proper party? She has chosen to proceed against Nichols for the unlawful detention. It is of little consequence who are made parties in cases of this kind. It is incumbent on the petitioner to show an unlawful detention by some one, and an officer claiming the right to imprison by virtue of process, is properly a party for the purpose of testing the legality of the commitment. In this state, the state has generally been made defendant, where the arrest has been made to answer to a criminal charge. We are not disposed to hold that the action of the court below in every such case is final. Of the impropriety of

doing so, the proceedings in this case furnish a sufficient example.
* * *

(So much of the opinion as relates to the merits of the case is omitted.)

Section 5.— Pleading, Practice and Procedure.

I. The petition for the writ.

STATE EX REL. DUSTIN v. ENSIGN.

1882. SUPREME COURT OF NEBRASKA. 13 Neb. 250; 13 N. W. 216.

MAXWELL, J.—On the twenty-seventh day of May, 1882, the relator filed a petition in the county court of Lancaster county alleging that he was illegally restrained of his liberty by the defendant. The court thereupon issued a writ of *habeas corpus*, to which the defendant made return that he held the relator by virtue of a *mittimus* issued by the county judge of Webster county, in which *mittimus* it was stated that said Dustin had been examined by said judge on the charge of horse stealing in said Webster county, and that said judge found that there was probable cause for holding said John Dustin to answer to said charge, at the next term of the district court, etc. The court held that it had no authority to review the case, and remanded the prisoner. The case was taken on error to the district court, where the judgment of the county court was affirmed. The case is brought into this court on petition in error. There is no copy of the petition for a writ of *habeas corpus* which was presented to the county judge. Whether this omission is intentional or not, does not appear; nor was any copy of the petition taken into the district court. There is, therefore, nothing before the court upon which it can act. The petition must set forth the facts constituting the illegal detention. It is not sufficient to state that the petitioner is restrained of his liberty, as that is a conclusion, but it must be made to appear in what the illegal restraint exists. *Ex parte Nye*, 8 Kan. 99. And where a petition is presented for alleged want of probable cause, it should set forth all the testimony taken before the examining magistrate. *In re Snyder*, 17 Kan. 553; *In re Balcolm* 12 Neb. 316; (s. c. 11 N. W. 312).

The question whether or not evidence should have been received by the county judge cannot be determined without a statement of the fact as to the cause of the illegal detention.

There is no error in the record and the judgment is affirmed.

STATE EX REL. WALKER v. DOBSON.

1896. SUPREME COURT OF MISSOURI. 135 Mo. 1; *supra* p. 714.

EX PARTE WALPOLE.

1890. SUPREME COURT OF CALIFORNIA. 84 Cal. 584; 24 Pac. 308.

Per Curiam.—Petition for writ of habeas corpus on the ground that the petitioner had been held to answer on a criminal charge before the superior court without reasonable or probable cause. The petition does not show what the charge is upon which he has been committed, but does allege that there is no evidence whatsoever taken upon his preliminary examination, showing, or tending to show, that he is guilty of any offense whatsoever. But this is merely his conclusion, and it may be an erroneous conclusion. A petition for *habeas corpus* must be verified, and must allege facts showing an illegal imprisonment. When the ground of the petition is that the prisoner has been committed without reasonable or probable cause, it must set out what the evidence on the examination was in such form that perjury may be assigned upon the allegations, if they are false. Writ denied.

STATE v. PHILPOT.

1831. SUPERIOR COURT OF GEORGIA. Dudley 46.

A MOTION for Philpot's discharge was made, argued and overruled at a former term upon a state of facts precisely such as now exist. The court is again moved in this matter upon grounds not then assumed, and is prayed to reconsider its decision then pronounced. Advisement has been had upon every question raised by the counsel for the movant, and the whole case attentively considered, and the decision of the court will now be pronounced upon each distinct ground on which counsel have rested the motion.

It is contended that the writ of *habeas corpus* for the disobedience of which Philpot has been attached, is illegal and void, and that the writ, and every proceeding under it should be set aside by the court. Two causes have been assigned against the legality of the writ, and these form the first and second grounds in the motion.

The first cause is irregularity. The first ground in the written motion submitted is "Because the *habeas corpus* by virtue of which

the said John N. Philpot was brought before the court, issued illegally in this, that it issued without an affidavit to support it;” though other matters besides the want of an affidavit were insisted on in the argument. The particulars are three, in which the irregularity is said to consist. 1st. The petition is not by the guardian of the boy, James. 2d. The boy’s name is not mentioned in the writ. 3d. Want of an affidavit. The first of these is no irregularity. *It is not necessary there should exist any particular legal relation between the petitioner and the person for whose benefit the writ is awarded.* The person imprisoned or illegally detained, may himself petition or complain, or any other person may do it for him. Nor is the omission of the boy’s name an irregularity. It can be considered but as a vagueness or uncertainty in the writ, which cannot affect its validity, if enough appear to indicate the person intended. But if it be an irregularity, we shall see whether it have not been waved. *An irregularity is the non-conformity to some settled rule of proceeding, by either omitting to do something that is necessary, or doing it at an unseasonable time or in an improper manner.* If the verification of the facts contained in the petition for *habeas corpus* be something necessary to the attainment of the writ, then its omission is an irregularity.

The writ before the court is a *habeas corpus ad subjiciendum*; at common law, and nearly a century ago the judges of England gave it as their unanimous opinion that such a writ ought not to issue of course, but upon probable cause supported by affidavit, which has been the regular practice since. But though the writ ought not to issue regularly without an affidavit, is the affidavit, therefore, an essential part of the writ? The case of the Lady Leigh, cited in 3 Bac. Abr. 5, shows that it is not. In that case, no fact was sworn to, but that the Lady Leigh had complained in a letter to her mother, yet the court declared the writ should go to enable her to make oath to the matter complained of, and exhibited articles against her husband; and further, that the Lord Leigh, though a Peer, should be attached if he refused obedience to the writ. However, though the affidavit be not of the essence of the writ, it will never be dispensed with, except in cases of great emergency, and the omission will be adjudged an irregularity. We will consider how far this irregularity affects the present case.

In Tidd’s Practice, 435, the rule of law on this subject is stated to be “That whenever proceedings are irregular, the court on motion will set them aside, provided the application for that purpose be made in the first instance; for in all cases of irregularity, the parties should apply to the court as early as possible; and if he either proceed himself after discovering the irregularity, or lie by and suffer the other party to proceed, the court will not assist him.” The language of the court in the case of Pearson v. Rawlings, 1

East 77, is clear and very strong. "It is the universal practice of the court that where there has been an irregularity, if the party overlook it and take subsequent steps in the cause, he cannot afterwards revert back to the irregularity and object to it. Justice requires that the rule should be general in its operation, having in view the advancement of right. And however we may be inclined to favor persons in the situation of the defendant, yet we must not go to the length of breaking in upon the general practice of the court." The same doctrine is held in the case of *D'Argent v. Vivant*, 1 East 330. "A defendant may waive irregularity, and is considered as having done so by submitting to the process, instead of taking steps to avail himself of the irregularity, which ought always to be done in the first instance." See also *Fox v. Money*, 1 B. & P. 250. *Davis v. Owen*, *id.* 342. This rule is applicable however, only to cases of irregularity. It is different where there is a complete defect in the proceedings. The former may be waived but not the latter. *Goodwin v. Perry*, 4 T. R. 577. *Hussey v. Wilson*, 5 T. R. 254. *Stevenson v. Danvers*, 2 B. & P. 110.

The distinction is then plainly this, that where that is wanting, without which the whole proceedings are void, no subsequent steps will cure the defects. It is radical. But if that be wanting which will merely render the proceedings voidable, it may be waived by subsequent steps. The case of the *Lady Leigh*, before referred to, proves that the verification of the facts contained in the petition, forms no part of the process of *habeas corpus*; for in her case, the writ was ordered to go as well that she might have an opportunity of swearing to the facts as of exhibiting articles against her husband. The affidavit is not as in bail cases, a part of the process, but is only a preliminary measure in attainment of the process, which is the writ of *habeas corpus* itself, and serves no other purpose than to convince the mind of the judge that the writ should issue, and to prevent its being abused and made the instrument of vexation. What particular showing was made to the justice who issued this writ, beyond that contained in the petition, does not appear; no affidavit is annexed. He, however, exercising the power vested in him by law, awarded the writ, and much proceeding has been had upon it, yet the petitioner has not yet sworn to the facts in the petition. Let us look to these proceedings or subsequent steps, and see if enough has not been disclosed by Philpot himself to convince the court of the propriety and even necessity of issuing the writ in the first instance, and to amount to a waiver of any irregularity.

The first step taken by Philpot is his appearance in obedience to the writ, and moving to adjourn the return to a future day, to enable him to produce the boy, whom he admitted to be in

a certain place, which motion, (the petitioner consenting) is allowed.

The next is filing his return, in which no exception is taken, for want of an affidavit, nor averment made that the boy is a slave, though it is insisted that negroes or persons of color have no right to the writ. Then an argument upon the sufficiency of the return, which was adjudged evasive and insufficient, and an attachment ordered. And lastly, a motion for discharge from the attachment, on two grounds. 1. Because the period of imprisonment being indefinite, and unlimited the order was illegal and secondly, because the contempt was purged.

It is then disclosed and made as manifest to the court as any affidavit could make it, if Philpot's statements and admission are to be believed, that he had in his custody, power or control, the boy James, averred to be free, and the fact not denied by Philpot, or the boy claimed by him as a slave, or any other cause assigned for detaining him. The facts contained in the admission authorized the writ; the evasive return and subsequent events brought to the notice of the court by Philpot himself render it necessary to demand its strict obedience, and justice forbids that it should fail of its effect by reason of too nice an adherence to forms. And surely unless the affidavit be of the very substance of the process itself, the subsequent steps taken in this cause have waived the irregularity. It is the opinion of the court that it has been waived, and that it is now too late to object to or take any advantage from it. * * *

(So much of the opinion as relates to the right of persons of color, not slaves to enjoy the privileges of the writ, is omitted. That portion of the opinion dealing with the authority of the court to enforce obedience to the writ will be found under a subsequent division of this section.)

Requisites of the petition.—Cuddy, Petitioner, 131 U. S. 280; Andersen v. Treat, 172 U. S. 24; Street v. State, 43 Miss. 1; State v. Giroux, 15 Mont. 137; Craemer v. Washington, 168 U. S. 124; Champion, *Ex parte*, 52 Ala. 311; Maples v. Maples, 49 Miss. 393; People v. Cowles, 59 How. Pr. (N. Y.) 287; Maule, *Ex parte*, 19 Neb. 273; Morris, *In re*, 40 Fed. 824; Nye, *Ex parte*, 8 Kans. 99; Lawler, *Ex parte*, 28 Ind. 241; Snyder, *In re*, 17 Kan. 542; Royster, *Ex parte*, 6 Ark. 28; United States v. Sing Tuck, 194 U. S. 161; Simmons v. Georgia Iron & Coal Co., 117 Ga. 305; Lapique, *Ex parte*, 139 Cal. 19; Everett, *In re*, 138 Cal. 490.

2. Rule to show cause.

No settled rule can be laid down with respect to the practice of issuing a rule *nisi* on an application for *habeas corpus*. In England the practice of issuing the rule, seems generally to obtain. In America the most general practice seems to be to issue the writ directly and determine the cause on the return thereto. By statute in some states this latter practice is made obligatory.

3. The return.

"The answer in writing, signed by the party to whom the writ is addressed, stating the time and cause of the caption and detention of the prisoner and his production before the court or judge, or, if the prisoner be not produced, then the reasons for not producing him, constituted the return." Hurd, *Habeas Corpus*, p. 235.

IN RE CHIPCHASE.

1896. SUPREME COURT OF KANSAS. 56 Kan. 357; 43 Pac. 264.

JOHNSTON, J.—On September 13, 1895, H. G. Chipchase, the manager of the Missouri & Kansas Telephone Co., at Wichita, was arrested for the violation of an ordinance of the city of Wichita imposing a license tax on telephones, and prescribing penalties for using them without complying with its requirements. The first section of the ordinance provides that any company, corporation or person engaged in the telephone business in the city of Wichita, shall pay a license tax of \$12 per annum upon each business 'phone and a tax of \$10 per annum on each residence 'phone, used in carrying on such business, and making it unlawful to carry on the business without having obtained from the city clerk a license therefor. The second section provides that, if any company, corporation or person, carries on the business without procuring the license they will forfeit the sum of \$25 each day that each 'phone is used or operated. The third section makes it an offense to carry on the business without paying the tax and procuring the license, and provides that any manager, agent, servant, or employe of a company, corporation or person who shall violate the ordinance shall, upon conviction, be fined in any sum not exceeding \$100. The telephone company of which Chipchase was the manager, was engaged in the telephone business in Wichita, and it is alleged that the company had about 290 telephones in use within the corporate limits of the city. The company refused to pay the license tax or otherwise comply with the provisions of the ordinance, and, upon a complaint made, Chipchase was arrested, under a warrant issued by the police judge of the city of Wichita. Upon the application of Chipchase, the writ of *habeas corpus* was issued. In the return of the city marshal, he sets forth the fact that Chipchase is in his custody by virtue of a warrant duly issued as aforesaid, and also setting out a copy of the city ordinance, under which the petitioner was prosecuted. Chipchase excepts to the sufficiency of the return, and asks to be discharged from custody. It is insisted by the petitioner that the ordinance is void—First because the license tax is unreasonable and excessive; second, because it obstructs and

places a burden upon interstate commerce; third, because the instruments upon which the license taxes are assessed are covered by letters-patent.

In the application for the writ are found allegations to the effect that the license tax imposed is grossly excessive, and that, as the business of the company extends beyond the limits of the state, the license tax amounts to a tax on interstate commerce. These and other averments of the application, however, are not admitted in the return to the writ, and they were denied by counsel for the respondent at the hearing. The questions so well argued by counsel are therefore not ripe for decision, nor do any of the objections made afford grounds for the discharge of the petitioner. No issue was joined nor proof offered in the case. The averments of the application are not to be taken as true because they are not denied in the return. *The return is not treated as an answer to the application, but rather as a response to the writ.* The averments in the application are made for the purpose of obtaining the allowance of the writ, and it is not necessary that they should be answered or denied by the officer in his return to the writ. The statute prescribes what the return shall state, and in this instance it sets forth the cause of restraint, together with a written copy of the authority under which the petitioner is held, and appears to comply with the statutory requirement. Civ. Code, § 668. If the petitioner desires to controvert the return or any part thereof, or allege any new matter showing the restraint to be illegal, he may do so after the return is made. Civ. Code, § 669. In this way an issue may be formed, and, upon a hearing, the disputed questions of fact may be settled. As the ordinance is included in the return, we may inquire and determine, whether upon its face it is valid. Express authority has been given by the legislature to levy and collect license taxes upon all callings, trades, professions, and occupations, including telephone companies, within the limits of cities of the first class. Gen. St. 1889, pars. 555, 804. In such cases it has been held that the municipality is not limited to the mere expense of regulation, but that they may be imposed for the purpose of obtaining revenue to meet the general expenses of the city. *Fretwell v. City of Troy*, 18 Kan. 271; *City of Newton, v. Atchison*, 31 Kan. 151, 1 Pac. 288; *Tullos v. City of Sedan*, 31 Kan. 165, 1 Pac. 285; *City of Cherokee v. Fox*, 34 Kan. 16, 7 Pac. 625; *City of Wyandotte v. Corrigan*, 35 Kan. 21, 10 Pac. 99; *City of Girard v. Bissell*, 45 Kan. 66, 25 Pac. 232. While the tax levied appears to be very large, we cannot say as a matter of law that it is excessive, nor can we without proof hold that it is oppressive or prohibitive. In *Fretwell v. City of Troy*, *supra*, it was said that "the mere amount of the tax does not prove its invalidity." The city cannot impose a license tax beyond the necessities of the city, nor can it impose one so excessive as to prohibit or destroy the occupation or business. *City of*

Lyons v. Cooper, 39 Kan. 324, 18 Pac. 296. Many things, however, enter into the determination of what constitutes a just and reasonable license tax, but as to the conditions existing in Wichita we are not advised. There is the nature of the franchise or privileges enjoyed by the company, within the city, the prices which they charge for the service given by it to its patrons, the amount of property tax, if any, paid by the company, the current expenses of the municipality, and the amount of its indebtedness. Without information upon these questions, the court cannot determine that a license tax of \$12 per annum upon a business 'phone and \$10 upon a residence 'phone is prohibitive, excessive or oppressive. *Habeas corpus* may not be the most appropriate proceeding in which to determine the questions presented and discussed by counsel, but, before we can decide them in this proceeding, an issue must be joined, and the facts must be either established by proof or agreed upon by the parties. The petitioner will be remanded. All the justices concurring.

IN RE AH TOY.

1891. U. S. CIRCUIT COURT, N. D. CALIFORNIA. 45 Fed. 795.

HAWLEY, J.—The return to the writ states that the petitioner is held in custody by the chief of police of the city and county of San Francisco under and by virtue of a commitment regularly issued from the police court of said city and county, stating that the petitioner had been duly convicted of a misdemeanor in visiting a house of ill fame, and sentenced to pay a fine, with the alternative of imprisonment. The return does not state under what particular ordinance petitioner was convicted, and petitioner therefore claims that the facts stated in the return are not sufficient to justify his imprisonment. The petition for the writ alleges that the petitioner is in custody for a supposed violation of section 33 of order 1587 of the board of supervisors, and claims that he is entitled to his discharge, upon the ground that said order is null and void. Upon the hearing before the commissioner, to whom this matter was referred, it was shown by petitioner that he was convicted of a violation of order 1955, "amendatory of section 33 of order 1587, prohibiting disorderly houses, houses of ill fame, and places for the practice of gambling." This amendatory order expressly provides that it shall be unlawful for any person to "become an inmate of, or a visitor to, * * * any * * * house of ill fame." It therefore affirmatively appears that the defects complained of in the return were supplied by the allegations of the petition and proofs offered by the petitioner. The demurrer to the return is overruled. * * *

The petitioner is remanded.

EX PARTE DURBIN.

1890. SUPREME COURT OF MISSOURI. 102 Mo. 100.

(SO MUCH of the opinion as relates to the validity and effect of cumulative sentences of imprisonment, is omitted.)

BARCLAY, J.—A writ of *habeas corpus* was recently issued to the warden of the penitentiary at the instance of petitioner, to determine the legality of the latter's imprisonment there. The warden's return shows that the petitioner is held upon three commitments pursuant to three sentences by the criminal court of Lafayette county, one of which is for a term of three years for burglary in the second degree; and another for a like term on another charge of the same nature; and the other for a term of five years for burglary in the second degree and grand larceny, all of March 13, 1885.

None of the sentences names a date for the commencement of the imprisonment thereunder; but all contain the usual language committing the defendant to the custody of the sheriff to be by him removed to the penitentiary, etc. * * *

It appears from the return that all the sentences were passed upon the petitioner at the same term of court, and on the same day. (As to the effect of which see *Ex parte* Kayser, (1871) 47 Mo. 253.) They were all predicated on pleas of guilty. Even if it were considered erroneous to sentence him in any of these cases unless the conviction therein had preceded any prior sentence against him at the same term (as to which the issues presented do not require us to express an opinion), it cannot properly be assumed on this record that the trial court pursued such a course. On the contrary, in the absence of any counter showing, it will be presumed that it did not take any action, in the premises, that was either erroneous or irregular.

In this connection it is claimed for petitioner that, as his petition for the writ alleges that he was first convicted and sentenced on one charge and afterwards on the others, those allegations must be taken as true, for want of any denial thereof in the return. But this contention rests on a misapprehension of the nature of these proceedings.

The return is not designed to be responsive to the petition for the writ, but to the writ itself. If the return is untrue in any particular it may be met under the practice established by statute in this state (R. S. 1889, sec. 5372) by an appropriate proceeding raising the desired issue upon it. But, when no such issue is made, the facts stated in a return by a public officer are taken as true without reference to the allegations in the petition upon which the writ issued. *Ex parte* Bryan, (1882) 76 Mo. 253.

The petitioner is not illegally restrained of liberty and accordingly is remanded to the custody of the warden; all the judges concurring.

EX PARTE ZEEHANDELAUR.

1886. SUPREME COURT OF CALIFORNIA. 71 Cal. 238; 12 Pac. 259.

SHARPSTEIN, J.—The code requires a person on whom a writ of *habeas corpus* is served to make a return thereto and if the party is detained by virtue of any writ, warrant, or other written authority, a copy thereof must be annexed to the return. Pen. Code, § 1480. Such a return has been made in this case, and the petitioner excepts to the sufficiency of it, because, as he insists, no legal cause is shown for his imprisonment. The return shows that during the progress of a trial in the superior court the petitioner was called and sworn as a witness, and was asked a question by the court which he refused to answer. For such refusal he was adjudged guilty of contempt and ordered to be imprisoned until he should answer the question. There are no facts recited in the order which show, or tend to show, that the question was pertinent to the matter in issue. "A witness must answer questions pertinent and legal to the matter in issue." Code Civ. Proc. § 2065. It is his right "To be examined only as to matters legal and pertinent to the issue. *Id.* § 2066. Such being his right, we think it follows that his refusal to answer the question not pertinent to the issue, was no contempt, and that the other adjudging him guilty of contempt which fails to show that the question was pertinent to the issue, is invalid. Conceding as we do, that the court had jurisdiction of the action on trial, we cannot concede its power to inquire into matters outside the issues therein. It had power to order questions pertinent to the issue to be answered, but it had not power to order questions not pertinent thereto to be answered. As to matters not in issue it had no jurisdiction.

In order to show a legal cause for the imprisonment of the petitioner, the return in this case should show that the question which he refused to answer was pertinent to the matter in issue before the court, and, as this is not shown by the return, no legal cause for the imprisonment of the petitioner is shown, and he should be discharged, and it is so ordered. * * *

KING v. MAYOR AND BURGESSES OF LYME REGIS.

1779. COURT OF KING'S BENCH. 1 Douglas 149.

(ACTION in mandamus to restore a member of a municipality, claiming to have been improperly removed.)

(So much of the opinion only as relates to the requisites to the return to extraordinary writs, is given.)

BULLER, J.— * * * But it is insisted that this return may be true in everything, and yet the party be entitled to be restored, and that he has no opportunity of traversing the right, or bringing an action for a false return. I agree that, in these returns, the same certainty is required as in indictments, or returns to writs of *habeas corpus*. Lord Coke has distinguished certainty in pleading into three sorts. 1. Certainty to a common intent, which is sufficient in a plea in bar; 2. Certainty to a certain intent in general, as in counts, replications, etc., and so in indictments; 3. To a certain intent in every particular, which is necessary in estoppels. The second of those sorts is all that is required here, and I take it to mean what, upon a fair and reasonable construction, may be called certain, without recurring to possible facts which do not appear * * * It is one of the first principles of pleading, that you have only occasion to state facts; which must be done for the purpose of informing the court, whose duty it is to declare the law arising upon those facts, and to apprise the opposite party of what is meant to be proved, in order to give him an opportunity to answer or traverse it * * * If the return be certain on the face of it, that is sufficient, and the court cannot intend facts inconsistent with it, for the purpose of making it bad. * * * 1 Ventr. 19, also proves. 1. That although a return be true in words, yet, if it is false in substance, an action will lie, and 2. That presumption and intendment as far as they go, must be in favor of returns, not against them. * * *

In most of the states the statutory provisions respecting the petition and return in *habeas corpus* go into considerable detail. In no case, however, has the same strictness been applied to the petition, and especially to the return to a writ of *habeas corpus* which has been applied to the pleadings in ordinary civil actions or even to those necessary where other extraordinary writs are sought for. What Lord Coke called "Certainty to a certain intent in general," is all that has ever been required of a return to a *habeas corpus* and where the provisions of the statute are substantially complied with, the return will be held good.

For general requisites of the return, see Haller, *in re*, 3 Abb. N. Cas. (N. Y.) 65; Watson's Case, 9 Ad. & El. 731; Neill, *in re*, 8 Blatchf. (U. S.) 156; Waldrip, *in re*, 1 Ariz. 482; Jackson, *in re*, 15 Mich. 417; Hakewill, *in re*, 22 Eng. Law & Eq. 395; Mowry, *in re*, 12 Wis. 52; Finley, *ex parte*, 66 Cal. 262; Smith v. Hess, 91 Ind. 424; Pate, *ex parte*, 21 Tex. App. 190; Martin, *in re*, 46 Barb. (N. Y.) 142; Rex v. Clark, 1 Salk. 349; Noble, *ex parte*, 96 Cal. 362; Patterson v. State, 49 N. J. L. 326.

4. Evasive returns, and enforcing obedience to the writ.

IN THE MATTER OF SAMUEL STACEY, JUN.

1813. SUPREME COURT OF NEW YORK. 10 Johnson 327.

KENT, Ch. J.—The return is insufficient and bad upon the face of it. The writ was directed to Morgan Lewis, as commander of the troops of the United States, at Sackett's harbor; and under his title of "General of Division in the Army of the United States," he simply returns that "the within named Samuel Stacey, jun., is not within my custody." This was evidently an evasive return. He ought to have stated, if he meant to excuse himself for the non-production of the body of the party, that Stacey was not in his *possession or power*. The case of *The King v. Winton*, (5 Term R. 89), is to this point:—and the observations and decision of the K. B. in that case are entitled to our greatest attention. That was the case of a *habeas corpus* granted by a judge in vacation, and returnable immediately before him. The return by the person to whom the writ was directed was, that he had not the body of the party "detained in his custody;" and that return being filed in the K. B. an attachment on a rule to show cause, was made absolute against the party for an insufficient return. Mr. Justice Grosse, in giving his opinion, observed "That the courts always looked with a watchful eye at the returns to writs of *habeas corpus*; that the liberty of the subject essentially depended on a ready compliance with the requisitions of the writ, and the courts were jealous whenever an attempt was made to deviate from the usual form of the return, that the party had not the person in his *possession, custody or power*, and that it had not been adopted in that case, but an equivocal one substituted, and the words "power and possession" omitted.

The accompanying return, in this case, of Torrey, the provost marshal, does, of itself, contradict the return of General Lewis; for he admits that Stacey is detained in his custody, under an order issued from the adjutant general's office, at Sackett's Harbor, so late as the 24th of July last. This order and the detention under it, we are bound to consider as the act of General Lewis, the commander at that station, and we are equally bound to consider the prisoner as being in his possession, custody and power.

Here is then, appearing on the very face of the return, a contempt of the process.

But this is not all. The affidavit of Butterfield who served the writ, proves not only the fact, that Stacey was then in the cus-

tody, under the orders, and by the authority of General Lewis, but that the direction of the writ was intentionally disregarded.

The only question that can be made is, whether the motion for an attachment shall be granted, or whether there shall be only a rule upon the party offending, to show cause by the first day of the next term, why an attachment should not issue. After giving the case the best consideration which the pressure of the occasion admits, I am of the opinion that the attachment ought to be immediately awarded.

The attachment is but process to bring in the party to answer for the alleged contempt, and upon the present motion, we must act, as the courts have always, of necessity, acted, in like cases, upon the return itself, and the accompanying affidavits of the complainant.

This is a case which concerns the personal liberty of the citizen. Stacey is now suffering the rigor of confinement in close custody, at this unhealthy season of the year, at a military camp, and under military power. He is a natural born citizen residing in this state. He has a numerous family depending upon him for support. He is in bad health and the danger of a protracted confinement to his health, if not to his life, must be serious. The pretended charge of treason, (for upon the facts before us we must consider it as a pretext), without being founded upon oath, and without any specification of the matters of which it might consist, and without any color of authority in any military tribunal to try a citizen for that crime, is only aggravation of the oppression of the confinement. It is the indispensable duty of this court, and one to which every inferior consideration must be sacrificed, to act as the faithful guardian of the personal liberty of a citizen, and give ready and effectual aid to the means provided by law for its security. One of the most valuable of those means is the writ of *habeas corpus*, which has justly been deemed the glory of the English law; and the parliament of England as well as their courts of justice, have, on several occasions, and for the period, at least of the two last centuries, shown the utmost solicitude, not only that the writ, when called for, should be issued without delay, but that it should be punctually obeyed. (See Brown's case, Cro. Jac. 543, and the statute of 16 Car. I. c. 10, s. 8.) nor can we hesitate in promptly enforcing a due return to the writ, when we recollect that, in this country, the law knows no superior and that in England, their courts have taught us, by a series of instructive examples, to exact the strictest obedience to whatever extent the persons to whom the writ is directed may be clothed with power, or exalted in rank. On ordinary occasions, the attachment does not issue until after the rule to show cause; but whether it shall or shall not issue in the first instance,

must depend upon the sound discretion of the court, under the circumstances in each particular case. It may, and it often does issue in the first instance, without a rule to show cause, if the case be urgent, or the contempt flagrant. On this point the authorities are sufficiently explicit. *Rex v. Jones*, Stra. 185: *Davies, ex dem. Povey v. Doe*, 2 Bl. Rep. 892. Hawk. tit. Attachment, b 2, c. 22, s. 1.

If ever a case called for the most prompt interposition of the court to enforce obedience to its process, this is one. A military commander is here assuming criminal jurisdiction over a private citizen, is holding him in the closest confinement, and contemning the civil authority of the state. The parties are also, at so great a distance, that no rule to show cause could, be made returnable at this term; and if no good cause was shown at the next term, an attachment could not probably be issued from the city of New York where the court will then sit, and be returned the same term. Unless the attachment goes, the injured party may not feel the benefit of our assistance until the ensuing winter. That delay would render the remedy alarmingly impotent. The case of *Rex v. Earl Ferrers*, 1 Burr. 631, is a precedent in point, for awarding the writ in the first instance. In that case a second writ of *habeas corpus* was issued, (the first writ not being obeyed without fault, as the party who sued out the writ, and who was the brother of Lady Ferrers, agreed not to prosecute it), and not being obeyed, an attachment was moved for, without a rule to show cause, and was granted. Lord Mansfield observed, that "The court may enforce speedy obedience to the writ, and the circumstances of that case (where delay might be dangerous) required it. And, therefore, the court thought, under the extraordinary circumstances of that case, an attachment should issue to enforce obedience to the writ of *habeas corpus* which so much affected the security and preservation of that lady."

I am, for these reasons, of opinion that an attachment ought to issue.

Per totam curiam:—

Ordered that an attachment in this case issue against Gen. Morgan Lewis; but that the same be accompanied with a copy of this rule, which is to operate as instructions to the sheriff not to serve the same, if General Morgan Lewis shall forthwith, upon service of a copy of this rule upon him, discharge the said Samuel Stacy, Jun., or shall cause him to be brought before Nathan Williams, Esq., commissioner, etc., in obedience to the *habeas corpus* heretofore issued by him in this cause.

STATE v. PHILPOT.

1831. SUPERIOR COURT OF GEORGIA. Dudley 46.

(ONLY so much of the opinion as deals with the authority of the court to enforce obedience to the writ and punish for a defective or evasive return, is here given.)

* * * If the court have authority to issue the writ, it follows of course, that it has the power to compel obedience to it; and no higher contempt can be conceived, than a refusal to submit to such power, and an obstinate disobedience. That disobedience is contempt, has not been, and can not be denied, on the contrary is admitted, but at the same time it is contended, that the return of the 2d of November, 1829, is an act of submission, which being full and perfect, no disobedience is chargeable upon him. This return has been well considered on a former occasion, and of its evasiveness and insufficiency, it was then thought there could be no serious question. Such is still the opinion of the court. To have been full, it should have denied the custody, possession, power or control of the boy, not only at the time of the return, but also at the service of the writ. For the court to receive as sufficient, any return short of this, would be to enable all who might choose to evade the writ, easily to do so, by simply transferring the person confined to another between its service and return. The return of Sir Robert Viner, cited 3 Bac. Abr. 14, which was adjudged to be insufficient and equivocal, is very like the present. That was to a *pluries* writ, there having been no return to the first and second. The return was "that at the receipt of this writ, nor at any time since, has she been in my custody." This was held by the court to be insufficient, because upon the return to a *pluries* writ "he ought to say not only at the time of the receipt of this writ, but of any other," and equivocal because it simply denied the custody of the person alleged to be confined. The only difference between that case and this, is that this is a return to a first, that to a *pluries* writ. But the same obedience and return are required to each, and it is not our practice to issue *alias* and *pluries* writs, which leads to unnecessary expense and delay, but to enforce the first. If Philpot's return had shown, that neither at the service of the writ, nor at any time since, had the boy been in his possession, custody, power or control, it would have been full and perfect; but he evades a part, and will not swear that at the service of the writ the boy was not in his power or control. Had Philpot, however, sworn that the boy was not in his possession, power, custody or control, still if upon looking into the facts stated in the return, the conscience of the court should not be satisfied that all the material facts were disclosed, it was not bound to discharge him. In looking at his return, the conscience of no man can be satisfied that

all the facts are disclosed, but must be convinced that very material facts are suppressed; and this conclusion, to which the return itself would lead, becomes irresistible to the mind of the court, when it recollects the admission of this suppressed and most material fact by Philpot himself since the service of the writ, which fact is, that he had the boy.

A great deal of argument has been offered by counsel for the movant to show that the return should have been received as conclusive. That it is conclusive, the court has always held; and if it have erred at all on this point, the error has been in holding the return too conclusive, not only as against the applicant for the writ of *habeas corpus*, but also as against Philpot himself. He cannot be permitted even to amend his return, when once filed, 3 Bac. Abr. 14, much less to contradict it, or aver anything inconsistent with, or repugnant to it.

The 6th ground "Because if any contempt was committed, it was purged by the affidavits of Philpot, Carey, Turley, and the certificates filed in the cause," has been formally insisted on, and well considered by the court, and its opinion, then expressed, is still entertained. That the return is an evasion of the writ, is a matter about which there can be but little difference of opinion; and that an evasion of the writ is a contempt of court, admits of but as little doubt. As soon therefore as the return of the second of November was filed, Philpot was in contempt, and liable to be attached. But the court before awarding an attachment, called upon the defendant to show cause why it should not go against him. The cause shown was but an attempt to amend his return, which could not be allowed. Philpot's admissions and conduct on the 17th of October, followed by his evasive return, manifested a disposition to trifle with the authority of the court, and placed him in an attitude towards it, which rendered some unequivocal act of submission, and earnest and sincere effort to obey its process, necessary to extricate him from the situation in which he had voluntarily placed himself.

The rule to show cause was to furnish him an opportunity of making this submission, and showing this effort, or of yielding actual obedience. Not the slightest effort at obedience being shown, and the paper amendatory of the return and contradictory of the previous admission being rejected, an attachment became unavoidable, unless the court would surrender its own authority. At this stage of the proceedings the case is clear. Philpot is manifestly in contempt, and his punishment is the direct and inevitable consequence of his own conduct. Has his case been changed by anything which he has since done? He has in fact done nothing and yet it is said, if he were then in contempt, he is now purged of it. The contempt, it must be recollected, is his evasion of the

writ, and disobedience of its requirements. Not an act of his has been shown, nor an effort on his part to obey, although six months elapsed from the return of the writ until the removal of the boy, during all which time he was kept within a few miles of Philpot's residence, in the place where he had himself deposited him, and was for sale, which could not but have been known to him, and Philpot at large, free to exert all his energies.

Great reliance is placed on the affidavits of Carey and Turley. That of Turley shows nothing but that on the 28th of May, 1830, he purchased the boy from Carey, and the next day removed him to the western country, where he sold him. Carey's affidavit shows his purchase of the boy from Philpot between the 6th and 13th of October, 1829, having contracted for him some days before; that the boy had not been since in the possession, power, control, or custody of Philpot, and that some time since he had sold him, and does not know where he is.

These affidavits, so far from acquitting Philpot of his contempt, by showing an effort and sincere desire to obey the writ, and an entire failure in such effort, and an inability on his part, lead the mind rather to an opposite conclusion. It will not be forgotten that these are voluntary affidavits of persons not subject to the process of the court, or bound to state more than in the opinion of Philpot might suit his purpose, and were prepared under his direction, and to effect his enlargement after he had been attached. Hence that is only stated which may have been supposed sufficient to attain that end; and, hence, in Carey's affidavit, the mystery which is left to hang over the condition of the boy, the person to whom he had been sold, the direction in which he had been sent, the circumstances under which he had been purchased by Carey from Philpot, and their knowledge, or ignorance, at the time, of the boy's claim to freedom. It is not disclosed that Philpot sold the boy to Carey without a knowledge on the part of either or both of them, that the boy was free, or had any claim to freedom; that Carey gave any consideration for him; that after Philpot's admission of having the boy, and either before or since his return, he ever made application to Carey for the boy and that Carey had refused to re-deliver him, or that Philpot had adopted any measures whatever to regain the possession of him. Nor indeed was Carey bound to make any such disclosures, his affidavit being purely voluntary, yet the failure to make full and entire disclosures as to the boy, greatly weakens the effect of his testimony in Philpot's behalf; and taken in connection with all the circumstances of this transaction, excite a suspicion, that, although he may not have been an actual partaker with Philpot, yet that he was not wholly ignorant of his (Philpot's) attempt to evade the writ. But to give the fullest effect and force to the affidavits

of Turley, Carey and Philpot, himself, still, no one single act of obedience to the writ, or the slightest disposition to obey it has been shown, while throughout the whole case there appear to have been continued and obstinate struggles to elude and evade.

The 7th ground is that "the order of imprisonment was illegal in this, that it imposed upon Philpot a condition which it was impossible for him to perform, and because the court was not authorized to require the production of the boy, as the condition of his purging his contempt, if any were committed." As has been repeatedly said, the attachment was for an evasion and disobedience of the writ, and the only condition imposed on him was obedience. His imprisonment was not made to depend upon the arbitrary will of the judge, but upon his own will, if that will should lead to action. That such an order is not illegal, must be manifest to any one who considers the order and allows to the court the power to enforce its own process. Such orders are of common occurrence, and are absolutely necessary for the attainment of justice. They are issued and enforced against sheriffs, justices of the peace, and constables who collect money and neglect or refuse to pay it over when ordered to do so; to compel the production of personal chattels under a warrant for restitution, and in a variety of instances of small importance compared with personal liberty; and it would be a very singular defect of power in the court, not to possess the same means of enforcing the writ of *habeas corpus*. If the court had a right to issue the writ, it had a right to compel the production of the boy, and to issue the only means adequate to the attainment of that end. The indefinite use of the means beyond the attainment of the end, would be illegal and improper; up to that period it is both legal and proper.

The opinions of Senator Clinton as delivered in the case of Yates against the People, 6 Johns. Rep. 507, were much relied on in argument. How these opinions can be construed into a support of the principles assumed on this seventh ground, the court has not been able to perceive. The position for which Mr. Clinton contended, and successfully too, was that every commitment to be legal, must be definite and terminable, either by the efflux of time, or *on the doing of some act by the prisoner*. In speaking of imprisonment made to depend on the doing of some act by the prisoner his words are "And where an imprisonment is made to terminate on the doing a certain act on the part of the prisoner, every legitimate object will be answered, and his course of future conduct expressly marked out. He will not depend for his liberation on the varying volition or fluctuating caprice of the judge." The direct application of these opinions to the present case is

readily made by every one, but fully to sustain it. That the production of James is impossible, remains yet to be shown.

The eighth ground is "That the court had no jurisdiction over the said John N. Philpot, after the return was filed, and therefore all the subsequent proceedings were null and void."

If the position here assumed be true and his ground be tenable, it follows by necessary consequence, that the filing of any return, of whatever character, to a *habeas corpus*, is equivalent to a discharge of the defendant, and that the court can in no case inquire into its fullness or sufficiency; or if it do inquire and find the return imperfect and evasive, it at the same time makes the humiliating discovery, that the very act of contemning its authority has deprived it, not only of all power to protect the innocent and helpless who seek its shelter, but also of the power of self protection. The jurisdiction and power of the court cannot, however, be this easily evaded; for when once it takes cognizance of a cause it will see that full and ample justice be done, nor will it release its hold of the defendant until that end be attained.

* * *

RIVERS v. MITCHELL, JUDGE.

1881. SUPREME COURT OF IOWA. 57 Ia. 193; 10 N. W. 626.

(PETITION in *habeas corpus* by wife of plaintiff to recover possession and custody of her children taken from her without her knowledge or consent by plaintiff, her husband, from whom she had been separated. The writ issued and Rivers made return thereto that he had had possession and control of said children before said proceedings were begun but that five days before the said writ of *habeas corpus* was served on him, he had transferred the custody and control of said children to his mother and that she and said minors are no longer residents of Iowa but are at present in Missouri, and that he no longer has the custody or control of the said children. Petitioner moved to strike the answer from the files because it was equivocal and not responsive to the petition, which was sustained. Plaintiff failing to make further return, the court found him guilty of willfully disobeying the writ, in refusing to produce the bodies of said children and ordered him committed for contempt. Rivers applied for and obtained a writ of *certiorari* to review the said proceedings.)

ROTHROCK, J.—1. It is claimed that the judge of the circuit court of Des Moines did not have jurisdiction to issue the writ because the application was not made to the court or judge most

convenient in point of distance to the applicant, as provided in section 3452 of the code. In *Thompson v. Oglesby*, 42 Iowa 598, it was held that the person restrained is the applicant. As we understand it, the residence of John D. Rivers was at Des Moines, in Polk County. The petition charges that the children were, to the best belief of the petitioner, in Des Moines, in Polk county or in Dallas county. This was sufficient to authorize the issuance of the writ. Indeed, if it were only alleged that John D. Rivers was in Polk county, and that he unlawfully restrained the minor children, the presumption would be that he and the children were together, *Thompson v. Oglesby*, *supra*. The court, then, having had jurisdiction to issue the writ, did the answer show facts sufficient to oust the jurisdiction? Or, rather did Rivers show good cause for not producing the children in court, as provided in section 3475 of the code? We think he did not. These contests between husbands and wives, who are living separately and apart from each other, as to the custody of their minor children, are peculiar. Although denominated proceedings in *habeas corpus*, they are unlike the ordinary proceedings for the release of a party held upon a criminal charge. Although the minor child is denominated as the applicant for the writ, no contest is made by him. It is really a controversy between the father and the mother, and the question for the court to determine is, which of the contestants is the more suitable person to have the custody and control of the child? It was incumbent on Rivers to show good cause for not producing the children in court in obedience to the writ. They were presumably in his custody, and we think the court properly found that they were not beyond his control. He made no showing that he could not obey the writ. The mere fact that he put them in the possession of his mother, who took them over the state line and into Missouri, is no showing of an inability to produce them. For aught that appears he had the same power to bring them into the state, that he had to send them over the state line and into Missouri. Without some other showing than what was made, we think the court may fairly have found that the minors were taken out of the state for the very purpose of evading any proceeding which the mother might institute for the purpose of regaining the possession of them.

The plaintiff claims that the mere fact that the children were in a foreign jurisdiction when the writ of *habeas corpus* was issued, deprives the tribunals of this state of the power to inquire into the cause of their restraint. The case of *Jackson*, 15 Mich. 416, is cited and relied upon as an authority for the claim so made. In that case it appeared that Samuel W. Jackson, a minor, was taken out of the state of Michigan, by the wife of the respondent, several months before the writ of *habeas corpus* was

issued; that the wife remained out of the state with the minor; and that she had been duly appointed guardian of the minor by the Surrogate's court of Canada, West; and that the minor was not under the control of the respondent. The court was equally divided upon the question as to whether or not the mere fact of the absence of the child from the state was a sufficient excuse for not producing him in obedience to the writ. All of the judges were agreed, however, that the fact of the appointment of a guardian in a foreign jurisdiction should be regarded as a sufficient showing that the minor was beyond the control of the respondent. Upon the main question, we think, that the opinion of Mr. Justice Cooley, holding that the mere fact that the child was in a foreign jurisdiction is not a sufficient excuse for not producing him in obedience to the writ, is in accord with sound legal principles. In discussing the question he very pertinently says:—"The place of confinement is not, therefore, important to the relief, if the guilty party is within reach of process, so that by the power of the court he can be compelled to release his grasp. The difficulty of affording redress is not increased by the confinement being beyond the limits of the state, except as the greater distance affects it. The important question is, where is the power of control exercised?"

In *U. S. v. Davis*, 5 Cranch 622, it was held that the return to a writ of *habeas corpus* that the person alleged to be detained was not within the control and custody of the party to whom the writ was directed, and that such person was beyond the jurisdiction of the court, was evasive and insufficient, it appearing that such person had been removed in anticipation of the issuing of the writ by the party to whom it was directed.

In *re Stacey*, 10 Johns. 327, the return to the writ was, "that the within named Samuel Stacey is not within my custody." This was held to be an evasive return, because it was not shown that Stacey was not in the power or possession of the respondent. So, in the case at bar, the return should have shown that Rivers did not have the power to produce the children in court in obedience to the writ.

The writ of *certiorari* will be dismissed and the order of the court affirmed.

See also Warman, *In re*, 2 Wm. Bl. 1204; Shaw v. Smith, 8 Ind. 485; United States v. Davis, 5 Cranch (C. C.), 622; Shattuck v. State, 51 Miss. 50; Commonwealth v. Kirkbride, 1 Brewst. (Pa.) 541; Sears v. Dessar, 28 Ind. 472; United States v. Green, 3 Mason (U. S.), 482; Reg. v. Roberts, 2 F. & F. 272.

The general form of return, where respondent denies custody is "that the party has not the person in his possession, custody or power." Grose, C. J., in *Rex v. Winton*, 5 Term R. 89, *qui vide*.

5. Duty to produce the body of the person detained.

EX PARTE COUPLAND.

1862. SUPREME COURT OF TEXAS. 26 Tex. 387; *Supra*, p. 689.

BOARD OF SUPERVISORS OF LOWNDES COUNTY v.
LEIGH ET UX.

1892. SUPREME COURT OF MISSISSIPPI. 69 Miss. 754; 13
South. 854.

(So much of the opinion as relates to the right of the board of supervisors to take jurisdiction over poor orphans and bind them out, is omitted.)

Petition by the board of supervisors of Lowndes county against F. M. Leigh and wife for a writ of *habeas corpus* to obtain the custody of certain poor orphans. The petition was dismissed on demurrer, and petitioners appeal. Reversed.

The petition showed that there had been a contest before the board for the custody of the children in question, between defendants and one Snell, and that the board thereupon made an order that one J. W. Gardner should take charge of them, and secure a suitable home for them, the order further providing that they should not be "placed in the hands of either of the parties now contending for them." The petition alleged that, at the time the order was made, the children were in defendant's custody, and that Gardner demanded their delivery to him, but that defendants refused to surrender them. A writ was issued, and returned by the sheriff with the indorsement that it had been executed on the defendants, but that the children were not found. In this state of the case, defendants filed a demurrer to the petition which was sustained.

CAMPBELL, C. J.—The return "Not found" made the writ of *habeas corpus* in this case a failure, and the court should not have proceeded further with the case, until it had secured the bodies of the children. Especially should it not have permitted the appellees to be heard until relieved of the suspicion created by the allegations of the petition, coupled with the return of the sheriff, that the children had been concealed or removed to evade the writ. The proper procedure would have been to issue a writ, directed to the defendants, requiring them to produce the bodies, or show to the satisfaction of the court, that they could not. They should not be permitted to test the question in dispute about the custody of the children until the children are before the judge, to be disposed of by his determination. * * *

Reversed and remanded.

COMMONWEALTH v. DANIEL CHANDLER.

1814. SUPREME JUDICIAL COURT OF MASSACHUSETTS. 11 Mass. 83.

CALEB COGGESHALL made application to the court for a writ of *habeas corpus*, to be directed to the said Chandler, a lieutenant in the army of the United States, requiring him to bring in the body of Henry H. Coggeshall, whom the said Caleb stated to be his son, a minor and under his care, and whom the said Chandler detained under pretense of an enlistment into the army of the United States. Upon this application, supported by affidavit of the principal facts, the court ordered the writ to go.

Chandler made return upon the writ, in substance, that he could not bring in the body of said Henry H., because he, the said Henry H., was not in his custody, or within his control, at the time of the service of said writ, nor did he know where he was; he further returned, that, some days previous, the said Henry H., had enlisted into the army, but had immediately after deserted; and he made a copy of the enlistment a part of the return; by which it appeared that the said Henry H. stated himself to be of age when he enlisted.

Gorham for the commonwealth moved for leave to prove that the return was false. He observed that the statute empowers the court to compel obedience, and to punish disobedience to the writ by attachment. And surely a higher act of disobedience cannot be supposed than a false return. If the truth of the return cannot be questioned, the provisions of the statute may be always evaded, and the writ be rendered ineffectual. There is, indeed, a penalty of 100 pounds for disobedience; and the party injured is entitled to his action on the case for a false return. But these consequences will be disregarded in many cases; and generally in those of great outrage and requiring the most speedy relief.

But Gorham upon further inquiry, finding that there was, in fact, a desertion, as stated in Chandler's return, waived his motion; and the court gave no opinion on this point.

Gorham then moved for leave to prove that the said Henry H. was a minor, etc., with the view that, if the fact was proved, the court might pass an order declaring that the original taking was unlawful, and that the said Henry H. might continue to go at large, notwithstanding the pretended enlistment. He said, that, although, it appeared, by the return, that the lad was at large, yet it also appeared that the officer had, *prima facie*, a good right to take and detain him. One object of the statute is, that the party shall not be restrained again for the same cause, where he has been liberated. Here, though, he is now free, there exists a lawful right *prima facie* to seize him. The court has awarded

the writ of *habeas corpus* on the application of a master, where it appeared that the minor had enlisted voluntarily and was not detained against his will, and has discharged the minor under such circumstances. This, in effect, only annulled the authority to hold him; for he was free before, so far as his own will and consent could make him. The discharge merely restored to the master the right of custody of his apprentice. We wish to prove a fact which shall annul the authority which (as appears by the return) the officer has to retake him.

By the Court. It appearing, by the return of the respondent, that the person was not in his custody, nor within his control, at the time of the service, the writ is without effect. It will be time enough to hear evidence of the facts in the case when the party is brought before us. Until then, we can take no order upon the subject. The return must be taken for true.

Motion overruled

PEOPLE EX REL. WINSTON v. WINSTON.

1898. SUPREME COURT OF NEW YORK, APPELLATE DIVISION.
52 N. Y. Supp. 814.

(THAT portion of the opinion, reviewing the provisions of the New York *Habeas Corpus* Act, is omitted.)

INGRAHAM, J.— * * * The petition upon which the writ in this case was granted alleged that the infant whose custody was sought was imprisoned and restrained of her liberty at No. 243 E. 120th Street, in the city of New York, and in the borough of Manhattan, by Lillian Winston, and that said Lillian Winston resided at such address in the city of New York. Upon the return of that writ this allegation was denied. The return alleges that the said infant is now living at 108-110 Fourteenth Street, Hoboken, N. J., the home of the respondent, and has been so living with the respondent since the second day of March, 1898; and that the said infant is not, and has not been a resident of the state of New York since the last-mentioned date. To that return no traverse was interposed, and by it a material fact, required to be alleged in the petition upon which the writ was awarded, was put at issue, and a question of fact was then presented upon which rested the jurisdiction of the court to pass upon the question which the relator sought to have determined; for if the infant and her mother, in whose custody she was, were, at the time the writ was issued, *bona fide* residents of another state, and the infant was not within this state, the court evidently had **no** jurisdiction to pass upon the question of the custody

of the child, and should have dismissed the proceeding. The relator, being a resident of this state, was entitled to apply to the court for a writ of *habeas corpus* requiring the body of the child to be produced before the court; but if the child, at the time that writ was issued, was actually a resident of another state, and was actually in that state under the care and custody of the mother, who was also a resident of that state, the right of the parent to the care and custody of the child cannot be determined by the court of the state in which the child was not a resident, or was not actually present before the court. The fact of the residence of the father in this state, would justify the application to the courts of this state for the custody of the child, and, if the child was actually within the jurisdiction of the court, the question as to the custody could be determined. Jurisdiction over the child must be obtained, and that jurisdiction can only be obtained by the presence of the child before the court, as it is only when a person is detained in custody within this state that the writ of *habeas corpus* is applicable. There is no question here of a person actually a resident of this state removing a child, who is also such a resident, from the state, for the purpose of avoiding the jurisdiction of the court. There was no traverse interposed to the return which presents such a question. That the court has jurisdiction over its citizens to determine this question may be assumed; and where a citizen and resident of this state, for the purpose of avoiding the jurisdiction of this court, removes a child from the state, the court may enforce the return of the child to the state where it can obtain jurisdiction of the person in whose custody and control the child is, so that the court may have jurisdiction over the person of the child, and thus determine the question as to its custody. In such a case, if the person in whose custody the child is were within the jurisdiction of the court, and if such person refused to obey the direction of the court to produce the child before it, the court would then have the power, under section 2028 of the code, to issue an attachment, and commit the person thus refusing to obey the direction of the court until such direction was obeyed; but until the child is actually produced before the court, so that it is within its jurisdiction, it seems to me clear that there can be no adjudication upon the question as to the custody of the child. And where, upon the return to the writ, it appears that the child was not actually a resident of or within this state, or not under the control or in the custody of a person who is a resident of this state, the court then has no jurisdiction to determine in such a proceeding the question of the custody of such non-resident. It was also error for the court to award the custody of the child to a party to the proceeding without the child being before the court, and without an examination into the merits of the application, even though

the person in whose custody the child was had failed to make a return, and was in contempt. The one consideration in determining a proceeding of this character, is the welfare of the child. The character of the parents, when each claims the right to have the care and custody of the child awarded, is a matter to be inquired into by the court, to determine to whom the custody of the child should be awarded; and upon the facts being ascertained the court has to determine what would best subserve the interests of the child, and the custody of the child will not be taken from one parent and given to another merely to punish one of the parents for failure to comply with an order of this court. This question received very careful consideration by this court in the case of *Sternberger v. Sternberger*, 12 App. Div. 398, 42 N. Y. Supp. 423, and it is only necessary to refer to that case for the principles which should control the court in determining proceedings of this character.

I think, therefore, that the order appealed from was unauthorized, and should be reversed, with \$10 costs and disbursements. All concur.

EX PARTE BRYANT.

1803. SUPREME COURT OF VERMONT. 2 Tyler 269.

AT the last term the grand jury presented an indictment against William Bryant, *billa vera*. A *capias* issued, and he was apprehended and gave bail, with sureties for his personal appearance at this term.

On motion of the state attorney, the crier was proceeding to call the principal; when

Keyes for the sureties, suggested to the court, that Bryant was a prisoner for debt in Woodstock gaol, Windsor county, and he moved for a writ of *habeas corpus* to bring him into court for trial in discharge of the recognizance.

The court ordered a writ of *habeas corpus ad prosequendum* to issue, directed to the sheriff of Windsor county, as keeper in chief of that prison.

The sheriff of Windsor county returned, that the prisoner was in his custody, but sick and languishing, so that he could not be removed without endangering his life, and therefore prayed to be in mercy for not obeying the writ.

The state attorney objected to the validity of the return, and moved for a rule upon the sheriff for a contempt.

Sed per curiam. The return is satisfactory to the court. If the prisoner be dangerously sick, it is a sufficient reason why he

should not have been removed; but a return of this nature, it is expected, will in future be accompanied with affidavits of physicians, that the court may judge whether the bodily indisposition of the prisoner be so great as to justify the sheriff in his disobedience to the writ. * * *

See also *People v. Winston*, 56 N. Y. S. 323; *Rex v. Winton*, 5 Term R. 89; *Stacy, In re*, 10 Johns. (N. Y.) 328; *State v. Jones*, 32 S. Car. 583; *Sifford, Ex parte*, 5 Am. Law Reg. 659; *Rex v. Wright*, 2 Burr. 1099; *Rex v. Turlington*, 3 Burr. 1115; *Rivers v. Mitchell*, 57 Iowa 193; *People v. Heffernan*, 38 How. Pr. (N. Y.) 402; *Rex v. Clarke*, 3 Burr. 1362; *Medley, Petitioner*, 134 U. S. 160.

At common law the return need not be verified; by statute now, in most of the states, such verification is required. The Federal Courts follow the common law practice and hence the return of a federal officer or agent to the writ when issued from the court of a state whose statute requires verification, need not be verified. *Neill, In re*, 8 Blatch. (U. S.) 156.

Where the prisoner is detained by virtue of a warrant, commitment, writ or other written authority, the return should include a copy thereof. *State v. Richardson*, 34 Minn. 115; *Smith v. Hess*, 91 Ind. 424; *Waldrip, In re*, 1 Ariz. 482; *Mowry, In re*, 12 Wis. 52.

Where the commitment is in open court to an officer there present, a warrant is obviously unnecessary, but the return should plainly indicate the proceedings had. *Rex v. Clerk*, 1 Salk. 349.

6. The return, to whom directed.

BRASS CROSBY'S CASE.

1771. COURT OF COMMON PLEAS. 2 Wm. Blackstone 754.

GLYN moved on Thursday, 18th April, for a *habeas corpus*, to bring up the body of Brass Crosby, Esq., Lord Mayor of the City of London; on affidavit, that he was confined in the Tower, by virtue of a warrant, from Sir Fletcher Norton, speaker of the House of Commons, a copy whereof was annexed. *Per cur.* Take your *hab. cor.*

On Monday, the 22d of April, Major Collins, Fort Major of the Tower, attended with the prisoner, in the absence of Major Ransford, Deputy Lieutenant of the Tower; who was confined with the gout, but had signed a return of the cause of his commitment and detention, directed to the chief justice only, and not to the other judges of the court. On which Glyn moved to discharge the prisoner; because no legal return was made to the *habeas corpus*. But the court held the direction to be surplusage, and that the return might be good without any direction at all. The writ and return were therefore filed and read. * * *

7. Particular matters of practice and statutory regulation.

In most of the states the means employed to test the sufficiency of the petition, is a motion to quash the writ. Service of the writ is usually governed by the rules applicable to ordinary civil process. Under the old practice the return was held conclusive as to its averments and relator's only remedy was an action for false imprisonment. Under the modern practice, the return may be duly traversed and the facts therein set up be put in issue. Penalty for a false return, is attachment for contempt. What the effect of a discharge on *habeas corpus* is, is doubtful; the weight of authority perhaps holds such discharge to be no bar to a prosecution on the same state of facts before a court having competent jurisdiction. In most of the states, as under the English Act, the statutes provide severe penalties for refusal to issue the writ on a proper cause shown or for re-imprisoning the person for the same cause or aiding or assisting in obstructing proper service and return to the writ. Appeals from the decisions of inferior tribunals in *habeas corpus* proceedings are usually provided for by statute; by the act of 1885 such appeals lie from the United States Circuit Court to the Supreme Court. But in all such cases it is rare for the appellate court to disturb the findings of fact of the lower tribunal.

Section 6.—Suspension of the Writ.

1. By the federal government.

EX PARTE MERRYMAN.

1861. U. S. CIRCUIT COURT, D. MARYLAND. 9 Am. Law Reg. 524;
17 Fed. Cas. 144, No. 9,487.

TANEY, Circuit Judge.—The application in this case for a writ of *habeas corpus* is made to me under the fourteenth section of the Judiciary Act of 1789 (1 Stats. 81), which renders effectual for the citizen the constitutional privilege of the writ of *habeas corpus*. This act gives to the courts of the United States, as well as to each justice of the Supreme Court, and to every district judge, power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment. The petition was presented to me, at Washington, under the impression that I would order the prisoner brought before me there, but as he was confined in Fort McHenry, in the city of Baltimore, which is in my circuit, I resolved to hear it in the latter city, as obedience to the writ, under such circumstances, would not withdraw General Cadwalader, who had him in charge, from the limits of his military command.

The petition presents the following case: The petitioner resides in Maryland, in Baltimore county; while peaceably in his own house, with his family, it was, at two o'clock on the morning of the 25th of May, 1861, entered by an armed force, professing to act under military orders; he was then compelled to rise from his bed, taken into custody, and conveyed to Fort McHenry, where he is imprisoned by the commanding officer, without warrant from any lawful authority.

The commander of the fort, General George Cadwalader, by whom he is detained in confinement, in his return to the writ, does not deny any of the facts alleged in the petition. He states that the prisoner was arrested by order of General Keim, of Pennsylvania, and conducted as aforesaid to Fort McHenry, by his order, and placed in his (General Cadwalader's) custody, to be there detained by him as a prisoner.

A copy of the warrant or order under which the prisoner was arrested was demanded by his counsel, and refused; and it is not alleged in the return, that any specific act, constituting any offense against the United States, has been charged against him upon oath, but he appears to have been arrested upon general charges of treason and rebellion, without proof and without giving the names of the witnesses, or specifying the acts which, in the judgment of the military office constituted these crimes. Having the prisoner thus in custody, upon these vague and unsupported accusations, he refuses to obey the writ of *habeas corpus*, upon the ground that he is duly authorized by the president to suspend it. * * *

As the case comes before me, therefore, I understand that the president not only claims the right to suspend the operation of the writ of *habeas corpus* himself, at his discretion, but to delegate that power to a military officer, and to leave it to him to determine whether he will or will not obey judicial process that may be served upon him. No official notice has been given to the courts of justice, or to the public, by proclamation or otherwise, that the president claimed this power, and had exercised it in the manner stated in the return. And I certainly listened to it with some surprise, for I had supposed it to be one of those points of constitutional law about which there was no difference of opinion, and that it was admitted on all hands that the privilege of the writ could not be suspended, except by act of congress.

When the conspiracy of which Aaron Burr was at the head, became so formidable, and was so extensively ramified, as to justify, in Mr. Jefferson's opinion, the suspension of the writ, he claimed, on his part, no power to suspend it, but communicated his opinion to congress, with all the proofs in his possession, in order that congress might exercise its discretion upon the subject, and determine whether the public safety required it. And in the debate which took place upon the subject, no one suggested that Mr.

Jefferson might exercise the power himself, if, in his opinion, the public safety demanded it. * * *

The clause of the constitution, which authorizes the privilege of the suspension of the writ of *habeas corpus*, is in the 9th section of the first article. This article is devoted to the legislative department of the United States, and has not the slightest reference to the executive department. It begins by providing "that all legislative powers therein granted, shall be vested in a congress of the United States, which shall consist of a senate and house of representatives." And after prescribing the manner in which these two branches of the legislative department shall be chosen, it proceeds to enumerate specifically the legislative powers which it thereby grants (and legislative powers which it expressly prohibits), and at the conclusion of this specification, a clause is inserted giving congress "the power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof." * * *

* * * The great importance which the framers of the constitution attached to the privilege of the writ of *habeas corpus*, to protect the liberty of the citizen, is proved by the fact, that its suspension, except in cases of invasion or rebellion, is first in the list of prohibited powers; and even in these cases the power is denied, and its exercise prohibited, unless the public safety shall require it.

It is true, that in the cases mentioned, congress is, of necessity the judge, of whether the public safety does or does not require it; and their judgment is conclusive. But the introduction of these words is a standing admonition to the legislative body of the danger of suspending it, and of the extreme caution they should exercise, before they give the government of the United States such power over the liberty of a citizen.

It is the second article of the constitution that provides for the organization of the executive department, enumerates the powers conferred on it, and prescribes its duties. And if the high power over the liberty of the citizen now claimed, was intended to be conferred on the president, it would undoubtedly be found in plain words in this article; but there is not a word in it that can furnish the slightest ground to justify the exercise of the power. * * *

The only power, therefore, which the president possesses, where the "life, liberty or property" of a private citizen is concerned, is the power and duty prescribed in the third section of the second article, which requires "that he shall take care that the laws shall be faithfully executed." He is not authorized to execute the laws himself, or through agents or officers, civil or military, appointed by himself, but he is to take care that they be faithfully carried into execution, as they are expounded and adjudged by the co-ordinate branch of the government to which that duty is assigned by the

constitution. It is thus made his duty to come in aid of the judicial authority, if it shall be resisted by a force too strong, to be overcome without the assistance of the executive arm; but in exercising this power he acts in subordination to judicial authority, assisting it to execute its process and enforce its judgments.

With such provisions in the constitution, expressed in language too clear to be misunderstood by any one, I can see no ground whatever for supposing that the president, in any emergency, or in any state of things, can authorize the suspension of the privileges of the writ of habeas corpus, or the arrest of a citizen, except in aid of the judicial power. He certainly does not faithfully execute the laws, if he takes upon himself legislative power, by suspending the writ of *habeas corpus*, and the judicial power also, by arresting and imprisoning a person without due process of law.

Nor can any argument be drawn from the nature of sovereignty, or the necessity of government, for self-defense in times of tumult and danger. The government of the United States is one of delegated and limited powers; it derives its existence and authority altogether from the constitution, and neither of its branches, executive, legislative or judicial, can exercise any of the powers of government beyond those specified and granted; for the tenth article of the amendments to the constitution, in express terms, provides that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states, respectively or to the people." * * *

While the value set upon this writ in England has been so great, that the removal of the abuses which embarrassed its employment has been looked upon as almost a new grant of liberty to the subject, it is not to be wondered at, that the continuance of the writ thus made effective should have been the object of the most jealous care. Accordingly no power in England short of that of parliament can suspend or authorize the suspension of the writ of *habeas corpus*. I quote again from Blackstone (1 Bl. Com. 136): "But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great as to render this measure expedient. It is the parliament only or legislative power that, whenever it sees proper, can authorize the crown by suspending the *habeas corpus* for a short and limited time, to imprison suspected persons without giving any reason for so doing." If the president of the United States may suspend the writ, then the constitution of the United States has conferred upon him more regal and absolute power over the liberty of the citizen, than the people of England have thought it safe to entrust to the crown; a power which the queen of England cannot exercise at this day, and which could not have been lawfully exercised by the sovereign even in the reign of Charles the First. * * *

Mr. Justice Story, speaking in his commentaries, of the *habeas*

corpus clause in the constitution says: "It is obvious that cases of peculiar emergency may arise, which may justify, nay, even require, the temporary suspension of any right to the writ. But as it has frequently happened in foreign countries, and even in England, that the writ has, upon various pretexts and occasions, been suspended, whereby persons apprehended on suspicion have been held for a long term of imprisonment, sometimes from design, and sometimes because they were forgotten, the right to suspend it is expressly confined to cases of rebellion or invasion, where the public safety may require it. A very just and wholesome restraint, which cuts down at a blow a fruitful means of oppression, capable of being abused, in bad times, to the worst of purposes. Hitherto, no suspension of the writ has ever been authorized by congress, since the establishment of the constitution. It would seem, as the power is given to congress to suspend the writ of *habeas corpus*, in cases of rebellion or invasion, that the right to judge whether the exigency had arisen must exclusively belong to that body." 3 Story, Comm. Con. § 1336.

* * * But the documents before me show, that the military authority in this case has gone far beyond the mere suspension of the privilege of the writ of *habeas corpus*. It has, by force of arms, thrust aside the judicial authorities and officers to whom the constitution has confided the power and duty of interpreting and administering the laws, and substituted a military government in its place, to be administered and executed by military officers. For, at the time these proceedings were had against John Merryman, the district judge of Maryland, the commissioner appointed under the act of Congress, the district attorney and the marshal, all resided in the city of Baltimore, a few miles only from the home of the prisoner. Up to that time, there had never been the slightest resistance or obstruction to the process of any court or judicial officer of the United States, in Maryland, except by the military authority. And if a military officer, or other person, had reason to believe that the prisoner had committed any offense against the laws of the United States, it was his duty to give information of the fact and the evidence to support it, to the district attorney; it would then have become the duty of that officer to bring the matter before the district judge or commissioner, and if there was sufficient legal evidence to justify his arrest, the judge or commissioner would have issued his warrant to the marshal to arrest him; and upon the hearing of the case, would have held him to bail, or committed him for trial according to the character of the offence, as it appeared in the testimony; or would have discharged him immediately if there was not sufficient evidence to support the accusation. There was no danger of any obstruction or resistance to the action of the civil authorities, and therefore no reason whatever for the interposition of the military.

Yet, under these circumstances, a military officer, stationed in Pennsylvania, without giving any information to the district attorney, and without any application to the judicial authorities, assumes to himself the judicial power in the district of Maryland; undertakes to decide what constitutes the crime of rebellion or treason; what evidence (if indeed he required any) is sufficient to support the accusation and justify the commitment; and commits the party, without a hearing, even before himself, to close custody, in a strongly garrisoned fort, to be there held, it would seem, during the pleasure of those who committed him.

The constitution provides, as I have before said, that "no person shall be deprived of life, liberty or property, without due process of law." It declares that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation; and particularly describing the place to be searched, and the persons or things to be seized." It provides that the party accused shall be entitled to a speedy trial in a court of justice.

These great and fundamental laws, which congress itself could not suspend, have been disregarded and suspended, like the writ of *habeas corpus*, by a military order, supported by force of arms. Such is the case now before me, and I can only say that if the authority which the constitution has confided in the judiciary department and judicial officers, may thus, upon any pretext, or under any circumstances, be usurped by the military power, at its discretion, the people of the United States are no longer living under a government of laws but every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found.

In such a case, my duty was too plain to be mistaken. I have exercised all the power which the constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome. It is possible that the officer who has incurred this grave responsibility may have misunderstood his instructions, and exceeded the authority intended to be given him; I shall, therefore, order all the proceedings in this case, with my opinion, to be filed and recorded in the circuit court of the United States for the district of Maryland, and direct the clerk, to transmit a copy, under seal, to the president of the United States. It will then remain for that high officer, in fulfillment of his constitutional obligation "to take care that the laws be faithfully executed," to determine what measures he will take to cause the civil process of the United States to be recognized and respected and enforced.

On September 24, 1862, President Lincoln, by proclamation suspended "the writ of *habeas corpus*, in respect to all persons arrested or who now

or hereafter during the rebellion shall be imprisoned in any fort, camp, arsenal, military prison, or other place of confinement, by any military authority, or by the sentence of any court martial or military commission." The following January, the constitutionality and validity of this proclamation came directly before the Supreme Court of Wisconsin, in the case of Kemp, *In re*, 16 Wis. 359 (*qui vide*), and an able and elaborate argument was had on both sides. The court, speaking through Dixon, C. J., in an extended and carefully considered opinion, based largely upon the decision in *Ex parte Merryman*, denied the right of the president of the United States to suspend the "writ," and held the proclamation of such suspension unconstitutional and invalid. The court, however, refused to issue an attachment, on the ground that it might lead to an unfortunate collision with the federal authorities. A similar opinion was expressed in the case of McCall v. McDowell, 1 Abb. (U. S.) 212, 15 Fed. Cas. No. 8,673 (1867).

On the ground of the president's authority as commander in chief of the army and navy, the United States Circuit Court, for the district of Vermont, in the case of Field, *Ex parte* (1862), 5 Blatch. (U. S.) 63, held that the proclamation of the president, of Sep. 24, 1862, was valid and constitutional.

The discussion excited by the proclamation above referred to, and the decisions thereunder, was doubtless a prime factor, moving the United States Congress to pass the act of March 3, 1863, conferring authority on the president "whenever, in his judgment, the public safety may require it, to suspend the privilege of the writ of *habeas corpus*, in any case throughout the United States."

On Sep. 15, 1863, the president, acting under the authority of the act of Congress, did issue a proclamation of suspension of the privilege of the writ.

Shortly after, in the case of Oliver, *In re*, 17 Wis. 681 (1864), the question was raised whether the act of March 3, 1863, was not unconstitutional, in that it conferred upon the president power belonging exclusively to congress. The supreme court of Wisconsin, speaking through Paine, J., held, however, "that although the act professes to confer on the president authority to suspend the privilege of the writ, whenever the public safety, in his judgment, should require it during the present rebellion, yet that it is itself an expression of the legislative judgment that the time has already arrived when the public safety requires the legislature to provide for a suspension, and that it does provide for a suspension, not absolute, but to take effect according to the judgment of the president, whether the authority conferred should be exercised in particular cases or not."

In the case of Fagan, *In re*, 2 Sprague (U. S.), 91, 8 Fed. Cas. No. 4,604, the validity of the same act and its scope were brought before the United States District Court in Massachusetts, and it was held that the phrase "privilege of the writ" meant the privilege of having judicial inquiry made into the cause of imprisonment, and a discharge if the detention be found unlawful, and that the "suspension of the privilege mentioned in the President's proclamation applied to all cases in *habeas corpus* before any court, where a final order had not been made at the date of the proclamation."

In Griffin v. Wilcox (1863), 21 Ind. 370, it was held that neither the president, nor the congress, of the United States, can suspend the issue of the writ of *habeas corpus*, by a state court. A similar doctrine seems to underlie the decision in People v. Gaul (1865), 44 Barb. (N. Y.) 98.

In the case of Commonwealth v. Frink, 4 Am. Law Reg. N. S. 700, the supreme court of Pennsylvania held that the power of suspension of the privilege of the writ, both under the act of 1863 and the president's proclamation, ceased with the termination of the rebellion, June 29, 1865.

2. Suspension of the writ by state governments.

Most of the states have provisions in their constitutions similar to that contained in the federal constitution, respecting the suspension of the privilege of *habeas corpus* in case of rebellion or invasion and when the public safety shall require it. But in Alabama, Maryland, Georgia, Missouri, North Carolina, Texas, West Virginia, and Vermont such suspensions are directly prohibited by the state constitutions.

Such suspensions of the writ were ordered in Rhode Island during Dorr's rebellion, in Massachusetts during Shay's rebellion, and in Idaho in 1899, the supreme court held that the proclamation of the governor declaring Shoshone county in a state of insurrection and rebellion, operated to suspend the privilege of the writ in said county. (*In re Boyle*. 6 Idaho 609.)

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